83-1948

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BETHLEHEM STEEL CORPORATION AND
BLANK, ROME, KLAUS & COMISKY,
Petitioners

v.

LEONA P. BOILEAU, BERNARD V. O'HARE, ESQUIRE,
JOANNE N. CASILIO, FERNANDO P. CASILIO AND
JOHN F. CASILIO, CO-PARTNERS T/A FRANK CASILIO & SONS,
JOHN CHILTON, DOROTHY LORRAINE CHILTON,
HENRY R. BANDELIN, MERRILE F. BANDELIN,
WILLARD H. RENNINGER, ALICE F. RENNINGER,
STEPHEN G. DONCEVIC, MARY D. DONCEVIC,
DONALD F. EISMANN, HELEN O. EISMANN,
BENJAMIN C. QUEEN AND NORMA L. QUEEN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a diversity action, must a district court entertain and resolve on the merits a collateral attack on prior state court judgments which the state court system has already reviewed and found no longer subject to challenge, solely to provide a federal forum for fact finding with respect to issues deemed foreclosed under state law?

2. Does a proposed amendment to the original diversity complaint entitle the disappointed state court litigant to federal review of the same state court judgments under 42 U.S.C.§1983 by asserting merely 1) alleged errors or irregularities in connection with their entry and post-judgment execution proceedings had thereon, and 2) a naked averment that the original state court plaintiff and its counsel "participated in a joint venture [with the state court trial judge] to deprive her of her property without due process of law?"

PARTIES TO THE PROCEEDING

In addition to the parties set forth in the caption of this petition, by third-party complaint, Bernard V. O'Hare brought Henry Boileau, husband of respondent Mrs. Boileau, into the action below as a third-party defendant.[1]

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1. Pursuant to Rule 28.1 of the Revised Rules of the Supreme Court of the Untied States, the affiliates and subsidiaries (except wholly-owned subsidiaries) of Bethlehem Steel Corporation ("Bethlehem") are listed below (Bethlehem has no parent corporations): Bethlehem Singapore Private Limited, Hibbing Taconite Company, Erie Mining Company, A Limited Partnership, Erie Development Company, Forest Oil/Bethlehem — Gas & Oil Joint Venture; Industria e Comercio de Minerios S.A.-Icomi ("Icomi"), Acos Anhanguera S.A., Amapa Florestal e Celulose S.A.-AMCEL, Brumasa Madeiras S.A., Companhia Dende do Amapa-Codepa, Campanhia Progresso do Amapa-Copram, Empreendimentos Brasileiros de Mineracao S.A.-E.B.M., Iron Ore Company of Canada, Carol Lake Company, Ltd., Gulf Power Company, Montagnais Hotel Services, Inc., Quebec North Shore and Labrador Railway Company, Retty Metals, Ltd., Iron Ore Land Company, Northern Land Company, Limited, La Compagnie de Telephone Ungava; Schefferville Power Company, Twin Falls Power Corporation Limited, Labrador Telephone Co., Itmann Coal Company, Kaycee Bentonite Partnership, Lamco Joint Venture, Met-Mex Penoles, S.A. de C.V., Minera Apolo, S.A. de C.V., Presque Isle Corporation, Restauradora de las Minas de Catorce, S.A. de C.V., Seadrill, Inc., Southeast, Incorporated, Thailand Offshore Joint Venture, Bethlehem Hotel Corporation, Nordex Joint Venture, Nubeth Joint Venture, Ontario Iron Company. Bethlehem also has an interest in 41 Brazilian exploration companies and 11 Brazilian forestry companies; Bethlehem's interest and the interest of Icomi (a partially owned subsidiary) in these companies constitutes 100% ownership of these companies.

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The petitioners, Bethlehem Steel Corporation and Blank, Rome, Klaus & Comisky,[2] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on March 28, 1984, and amended by Order of May 1, 1984.

2. The law firm is now known as Blank, Rome, Comisky and McCauley, but throughout the litigation, it has been referred to by its previous name, and that practice is continued here to avoid confusion.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit and the opinion of the United States District Court for the Eastern District of Pennsylvania are unreported as yet and appear in the Appendix hereto at A-1 and A-26, respectively.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit was entered on March 28, 1984, (A-69, A-1), vacating and remanding the judgment of the district court dated March 14, 1983. (A-26). The Court of Appeals denied a timely petition for rehearing in banc on April 23, 1984, (A-71), and this petition for certiorari was filed within ninety (90) days of that date. Issuance by the Court of Appeals of a certified judgment in lieu of a formal mandate has been stayed by that Court until May 30, 1984. (A-72).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, Section 1738, United States Code, provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Title 42, Section 1983, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunitites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

STATEMENT OF THE CASE

This case involves the potential for significant enlargement of the circumstances under which one who suffers a state court civil judgment may later collaterally attack that judgment in federal court. If the decision of the Court of Appeals stands, a state court civil judgment will become subject to collateral attack in federal court on both state and federal law grounds if the disappointed litigant alleges procedural deficiencies in connection with the entry of the original judgment and the state court rule of decision would deny review of the merits of such a claim in the context of a state court collateral attack because of the passage of time or other considerations not going to the merits.

The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Rhode Island and the defendants being citizens of other states.[3]

The genesis of the present federal court litigation lies in state court litigation instituted in 1972 by petitioner Bethlehem Steel Corporation ("Bethlehem"). Bethlehem, represented by petitioner Blank, Rome Klaus & Comisky ("Blank, Rome"), filed three actions in the Court of Common Pleas of Bucks County, Pennsylvania which were later consolidated. In one of them, an equity action, respondent Leona P. Boileau ("Mrs. Boileau") was named a defendant, as well as her husband, Henry Boileau, and numerous corporate entities connected with them. In essence, Bethlehem alleged that Mr. Boileau, while employed by Bethlehem, had conspired to defraud it of large sums of money through submission of false invoices, that the corporate defendants had been used as vehicles for the embezzlements,

3. The plaintiff in the District Court below was Mrs. Boileau. Petitioners Bethlehem and Blank, Rome were defendants, along with respondent Bernard V. O'Hare, Esquire, and the other respondent individuals, who are subsequent transferees of the real estate involved in the execution of the state court judgments.

and that Bethlehem had an equitable claim, under a constructive trust theory, as to any real and personal property owned by the Boileaus, to the extent such property had been purchased or improved with the embezzled funds.

The record in the Bucks County equity action reflects a return of the sheriff showing personal service on Mrs. Boileau, and that an appearance was entered on behalf of both Mr. and Mrs. Boileau by Bernard V. O'Hare, Esquire. After extensive discovery and other pretrial activity, the case was settled, and on June 21, 1972, at the request and with the consent of counsel for the parties, the court entered two judgments in favor of Bethlehem and against the Boileaus and their corporations.

On July 21, 1972, Mr. Boileau and Mr. O'Hare reported to the state trial judge that Mrs. Boileau objected to the judgments and would not execute deeds to convey certain real estate, as provided in one of the judgments, when requested by her counsel of record to do so. Mrs. Boileau was said to have stated that she did not engage O'Hare to represent her and claimed that she did not consent to the entry of the judgments. On August 14, 1972, the state trial judge, pursuant to a Pennsylvania statute, entered an order directing the sheriff of the county to execute the necessary deeds on Mrs. Boileau's behalf. Despite knowledge of the settlement agreement and its proposed post-judgment implementation, Mrs. Boileau made no attempt to come into court to state her own position, and neither did she seek to take advantage of the normal Pennsylvania process for appellate review of a judgment. She also became aware of the public sale of the property which was held shortly thereafter, and took no steps to challenge the sale.

Six years, less one day, elapsed from the entry of the judgments. Finally, on June 20, 1978, Mrs. Boileau initiated two proceedings attacking the 1972 judgments. First, she filed a "petition to strike" the judgments in the Bucks County court, a hybrid document which, by its terms, raised two forms of attack: a motion to strike the

judgments and a petition to open them. And second, she filed a diversity action in the United States District Court for the Eastern District of Pennsylvania seeking to void the 1972 judgments and claiming equitable relief and damages. No attempt was made in this complaint to plead a federal question.

The material averments of the state court petition and the federal complaint are virtually identical. In both, Mrs. Boileau claimed that she had never been served with Bethlehem's 1972 complaint, that there was no factual or legal basis for the judgments against her, and that it had been entered, without her consent, in violation of the Pennsylvania Rules of Civil Procedure and her due process rights under the constitutions of the United States and of Pennsylvania. Despite reference to federal constitutional rights in the state court petition, subsequent representations by Mrs. Boileau's counsel in the federal action indicated that she intended to withdraw any federal claims from state court consideration so as to preserve them for a later federal action. No effort was made by Mrs. Boileau actually to litigate such issues in the state court.

Because of the duplication between the state court petition and the federal complaint, the federal court entered a stay of proceedings in the federal action on the grounds that the state courts should be permitted the first opportunity to review the propriety of their own proceedings as a matter of state law, and that their determination could resolve most, if not all, of the issues in the federal complaint.

Notwithstanding the hybrid terminology of her challenges and the procedural confusion engendered thereby, the Bucks County court treated Mrs. Boileau's application both as a motion to strike off the judgments and as a petition to open judgment. It disallowed the former, however, because there were no irregularities on the face of the record — the only basis upon which, under Pennsylvania law, a motion to strike off a judgment

may be granted. (A-48-49). And, as to a petition to open, the court declined to consider the merits of Mrs. Boileau's challenge, because after almost six years, it was untimely under existing state precedent. (A-49-50).

Mrs. Boileau appealed to the Pennsylvania Superior Court. The Superior Court affirmed the Bucks County Court, *not* merely on the technical requirements limiting a motion to strike to the face of the record as later suggested by the Court of Appeals,[4] but also based on Mrs. Boileau's failure to bring a challenge to the judgments within a reasonable time after she had actual knowledge of the entry of judgments against her, and other equitable considerations referred to in the *Restatement (Second) of Judgments* (Tent. Draft No. 5, March 10, 1978), such as "the opportunity of the complaining party to challenge the defect, and on whether there has been reliance on the judgment." *Bethlehem Steel v. Tri State Industries, Inc.*, 290 Pa. Super. 461, 475, 434 A.2d 1236, 1243 (1981). (A-66).

After noting that the Bucks County court had "had jurisdiction of the subject matter and had jurisdiction over the parties", 290 Pa. Super. at 471-72, 434 A.2d at 1241, (A-62), the Superior Court found from undisputed evidence of record that Mrs. Boileau had admitted having knowledge of the judgments within weeks of their entry and also admittedly had knowledge of the judicial

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4. In the opinion of the Court of Appeals, it is assumed, contrary to the state court opinions, that the state courts treated Mrs. Boileau's petition as limited to the face of the record. (A-11, 14-15). On that premise, the Court of Appeals then cites a Pennsylvania opinion, *Bowman v. Berkey*, 259 Pa. 327, 103 A. 49 (1918), for the proposition that denial of a motion to strike does not preclude subsequent resort to a petition to open a judgment, which is an equitable remedy. (A-15). This led the Court of Appeals to suggest that still another equitable remedy might remain available under Pennsylvania law. (A-15 n.8). Since the trial court specifically considered the availability of a petition to open and since the Superior Court rested its opinion on equitable grounds, the premise of the Court of Appeals is wrong, and the remainder of the discussion becomes irrelevant.

sales. 290 Pa. Super. at 468, 475, 434 A.2d at 1239, 1243. (A-58 n.2, A-66). Nevertheless she had waited for almost six years, during which time "at least some of the realty appear[ed] to have been transferred to third parties in reliance on the consent judgment." 290 Pa. Super. at 475, 434 A.2d at 1243. (A-66). On these facts, the Court concluded that Mrs. Boileau's challenge was barred as untimely, and that the 1972 judgments would stand. 290 Pa. Super. at 476, 434 A.2d at 1243. (A-67).

A petition for reargument was denied, and the Supreme Court of Pennsylvania denied Mrs. Boileau's Petition for Allowance of Appeal. (A-68).[5] No appeal was taken directly to this Court by Mrs. Boileau.

With the continuing validity of the 1972 judgments thus established unequivocally by the Pennsylvania state courts, Bethlehem and Blank, Rome asked the federal district court to lift the stay of the federal action, and, simultaneously, sought summary judgment based on principles of res judicata and collateral estoppel. By way of opposition to the motion, Mrs. Boileau moved for leave to serve an amended complaint containing a new claim based on federal law — that the events pertaining to the 1972 judgments were actionable under 42 U.S.C. §1983.

The district court granted summary judgment in favor of Bethlehem and Blank, Rome and denied Mrs. Boileau's motion to serve an amended complaint. As to the summary judgment motion, the court ruled that the state law issues raised in the federal action had now been resolved by the collateral attack on the judgments in the Pennsylvania courts, and their decisions precluded relitigation of the issues presented by the original complaint. (A-32-34). As for the motion for leave to

5. The Court of Appeals mistakenly indicates in its opinion that, "The Pennsylvania Supreme Court affirmed without opinion." (A-11). Denial of a petition for allowance of appeal in Pennsylvania is analogous to a denial of a petition for a writ of certiorari by this Court.

amend under Fed. R. Civ. P. 15(a), the court observed that the motion had not been timely filed and, in any event, failed to state an actionable claim. Accordingly, in its discretion, the district court denied permission to amend. (A-34-37). The judgment in favor of Bethlehem and Blank, Rome was made final pursuant to Fed. R. Civ. P. 54(b), (A-40-41), while Mrs. Boileau's claims against Mr. O'Hare remained pending in the district court.

Mrs. Boileau appealed, invoking the jurisdiction of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291. On March 28, 1984, a Panel of that Court issued its *per curiam* opinion and judgment vacating the judgment below, remanding for further proceedings consistent with the opinion and, further, directing that the proposed amendment to the complaint adding a §1983 claim be allowed. Apart from the question of amending the complaint, the *only* issue presented for review was the propriety of the decision by the district court, sitting in diversity, to honor the finality of a state court determination that the 1972 judgments were no longer subject to collateral attack. Nevertheless, the Panel apparently was motivated by federal constitutional concerns which never arose in the district court, save for the belated request to amend. (A-13-18). Regarding the latter, however, the Panel ruled that leave should have been granted, (A-22), notwithstanding the express inability of its own members to agree whether the amendment stated a cause of action. (A-19 n. 10).[6]

6. In her reply brief and by motion in the Court of Appeals, Mrs. Boileau attempted to inject still an additional issue into the litigation: a charge that since members of Blank, Rome, or its Political Action Committee, had made publicly reported contributions to the election campaigns of various members of the Pennsylvania judiciary, she could not have had a fair hearing in Pennsylvania. This sparked discussion in the Court of Appeals' decision at several points (A-12-13, 17-18; and see Order Amending Opinion, A-23-24), but was not deemed a ground for decision by that Court, nor is the issue before this Court.

The Panel's decision is apparently premised on the conclusion that Mrs. Boileau never had a "full and fair opportunity" to prove the allegations of impropriety respecting the entry of judgments against her in 1972 because the Pennsylvania courts based their decisions upholding the judgments on grounds other than the underlying merits. Accordingly, the Court of Appeals held that doctrines of finality and full faith and credit could not apply, and that the judgment of the district court must, therefore, be vacated.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals substantially enlarges both the means and occasions for collateral federal court review of state court civil judgments, contrary to the decisions of this Court.

Analytically, this case should have presented two distinct issues. First, under respondent's initial diversity complaint, the issue is whether Mrs. Boileau could maintain a second collateral attack on the prior judgments after the state court system had held those judgments valid and no longer subject to challenge. The federal court was bound to look to state law as the source of its rules of decision and was required to determine whether another collateral attack upon the original state court judgments would be permitted under state law. Second, and entirely separately, in considering whether an amendment should have been permitted to the initial complaint so as to invoke review of the state court judgments under 42 U.S.C. §1983, a determination was required as to whether or not the requirement of action under color of law and, therefore, state action could be met.

A.

Whenever a state rule of decision holds that a collateral attack on a judgment is barred for reasons other than the underlying merits of the challenge, then, according to the decision of the Court of Appeals, the disappointed litigant is entitled to a merits hearing in the federal court. Yet so long as the federal court's subject matter jurisdiction is founded only in diversity, and so long as the complaint before the federal court invokes no federal question, the federal court ordinarily has no lawmaking power independent of its obligation to apply state law as the source of the rule of decision.

In order to bring into play the federal constitution as a source of the rule of decision, at least where a claim is being made against the opposing party in the state court

litigation and its counsel, there must be a determination that their conduct amounted to state action. Absent satisfaction of this threshold requirement, a federal court would become simply a forum for appellate review of errors or omissions by the state court, whether constitutional or otherwise. This has never been thought to be the role of the federal courts for, as this Court has noted, apart from a congressional grant of jurisdiction, there is no right to an "unencumbered opportunity" to litigate constitutional claims in a federal district court, *Allen v. McCurry*, 449 U.S. 90, 103 (1980), and there is no right to seek independent review in an inferior federal court of an erroneous application of federal constitutional law in a state court proceeding.

Here, the district court correctly apprehended the issue before it and applied state law principles of res judicata and collateral estoppel to bar relitigation of the validity of the original state court judgments.

In vacating the district court's entry of summary judgment, the Court of Appeals seemed primarily, if not exclusively, concerned with federal due process issues and with the fact finding advantages of a federal forum to an out-of-state litigant. In doing so, it brushed aside federalism and comity policies, well-established rules limiting the circumstances in which federal review of state court judgments is appropriate, and concerns reflecting the orderly administration of the federal judicial system.

By remanding the matter to the district court for further proceedings in light of its opinion, the Court of Appeals has placed the district court in an untenable position. The district court must either ignore the Court of Appeals and, applying *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Full Faith and Credit Statute, 28 U.S.C. §1738, and decisions of this Court applying that statute, again grant summary judgment based on state law; or it must ignore the authoritative determination of the state court system, contrary to *Erie* and the Full Faith and

Credit Statute, and examine the merits of the alleged irregularities in connection with the original judgments, applying rules of decision other than those derived from the state. The opinion of the Court of Appeals offers no explicit guidance on this matter, although its purpose seems to be to require federal fact finding and federal characterization of the significance of whatever facts may be found.

The decision of the Court of Appeals is rested, primarily, on *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1982), and *Allen v. McCurry*, 449 U.S. 90 (1980). By its initial reference to *Kremer* and related cases, (A-13), the Court of Appeals indicates, correctly, that if Mrs. Boileau had not had a full and fair opportunity to litigate her claims in the state court system, the state court decision barring review of the merits of her claim because of the lapse of time and other equitable considerations should not be afforded full faith and credit. But, the Court of Appeals then extends the *Kremer* principle by holding that despite the availability of ordinary appellate review in the state court system and despite the availability of post-judgment procedures to open a judgment if timely application is made, a state court determination not to examine the merits of an *untimely* collateral challenge to a judgment cannot be given preclusive effect in a federal court.[7]

Kremer, of course, held no such thing, nor does this Court's opinion intimate such a result. *Kremer* does not suggest that the *failure* of a litigant to make timely resort to state review practice allows that litigant later to argue that the absence of any merits hearing deprives a state court judgment of finality. Moreover, there is nothing in *Kremer* which supports the subsequent statement of the

7. See *Per Curiam* Opinion at A-14-15: ". . . we must conclude that the state court proceedings did not constitute 'full and fair' adjudication of the failure of service issue or the question of the unauthorized appearance entered by Mr. O'Hare and, therefore, did not resolve the merits of the dispute."

Court of Appeals that *Kremer* requires full litigation in the state system rather than a full and fair opportunity to litigate. (A-14-15). Indeed, this Court's recent decision in *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S.Ct. 892 (1984), points precisely in the opposite direction (Full Faith and Credit Statute requires claims preclusion effect under state law in subsequent §1983 action). *See also Angel v. Bullington*, 330 U.S. 183, 190 (1947); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

The Court of Appeals' confusion with respect to the opportunity to litigate is also evident from its references to *Allen v. McCurry, supra. Allen* is cited for the proposition that since the Pennsylvania courts did not consider alleged federal constitutional infirmities in the 1972 judgments, no preclusive effect can be given to the state court determination of the validity of those judgments. (A-14). The point might have some legitimacy had petitioners contended that Mrs. Boileau's proposed §1983 claim was barred by the state court adjudication. That argument, however, was never made either in the District Court or in the Court of Appeals. While she could have, Mrs. Boileau did not in fact litigate any federal constitutional claim in the state court and it was not argued that she was barred from doing so in the federal court if she could otherwise satisfy the requirements of the Civil Rights Act. *Allen* does not require a state court to consider an issue not presented to it and it does not call into question the finality of a state court judgment for state law purposes merely because a litigant later contends that the state court procedures were somehow infirm.

By wrongly invoking both *Kremer* and *Allen* and by denying full faith and credit to the state court system's own determination that its earlier judgments were no longer open to collateral attack under principles of state law, the Court of Appeals has opened the way to any diversity plaintiff who can make a claim similar to Mrs. Boileau's claim to force a hearing on the merits of a chal-

lenge to an earlier state judgment. Without regard, then, to the §1983 issue, the decision of the Court of Appeals invites a whole new breed of collateral challenges to state court judgments in the federal courts.

B.

The second issue, the sufficiency of the proposed amended complaint, should turn on whether a bald averment of a "joint venture" among petitioner and its counsel and the trial judge in the original state court action states a claim under the Civil Rights Act. Mrs. Boileau, through her counsel, acknowledged that she could present no other factual basis for her claim of a "joint venture" beyond the statement that the state trial judge encouraged settlement (noting that it would save everyone, including the taxpayers, money), accepted the proffered judgments in settlement of the litigation before him, and then applied Pennsylvania post-judgment implementation procedures at the request of Bethlehem.[8] Despite the suggestion of the Court of Appeals that the

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8. THE COURT: . . . Unless you have some connection between the defendants and the judge, some improper connection, you don't have a 1983 claim against the private defendants. If Bethlehem Steel, if there was a joint venture, there was consideration for it, there was something improper, tell me. If there wasn't, then the case is easy.

MR. LYMAN: Your Honor, I think we have been very careful to draft our proposed Amended Complaint so as not to make any innuendo that the judge received any money.

THE COURT: We are not here for innuendos. If there was something improper here, tell me, *tell me what the Bethlehem Steel and/or Blank, Rome did that injected state action into this matter in an improper way.*

MR. LYMAN: *They asked the judge to authorize the Sheriff to convey Mrs. Boileau's real estate to them.*

THE COURT: Anything else?

MR. LYMAN: There is nothing that I haven't already cited, Your Honor.

(Transcript of Hearing before the District Court, dated April 26, 1982 at 23) (emphasis supplied).

proposed amended complaint might encompass a constitutional challenge to the underlying Pennsylvania procedures for executing upon a judgment or a challenge to its procedures as they were applied to her, (A-19 n.10), Mrs. Boileau eschewed reliance on such claims. Rather, she chose to rest on the joint venture contention and based her claim on *Dennis v. Sparks*, 449 U.S. 24 (1980).

The reliance on *Dennis v. Sparks* is unavailing. If it is sufficient under *Dennis v. Sparks* for a disappointed litigant to plead no more than the words "joint venture", every losing party in a state court action can state a claim under §1983 framed in terms of a "due process" violation.

Even accepting the more expansive reading of the proposed amended complaint suggested by the Court of Appeals, the case upon which that Court relied, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), does not sanction the result. *Lugar*, of course, is concerned with what circumstances permit the conclusion that private parties become state actors through action under color of law. The decision in *Lugar* is, however, explicitly limited to the context of pre-judgment attachment. 457 U.S. at 939 n.21. Invocation by private parties of post-judgment execution procedures does not fall within *Lugar*. Moreover, and of at least equal moment here, the fact is that Mrs. Boileau did not challenge the facial constitutionality of Pennsylvania's procedures for entering judgments, effecting execution in the presence of a recalcitrant judgment debtor, or reviewing judgments. *Lugar*, even as to pre-judgment attachment, allowed only a claim that the procedure *on its face* failed to meet due process standards. 457 U.S. at 941. With regard to an attempted claim of a violation of due process by defendants' *abuse* of that procedure, this Court held that only private action, not state action, was implicated. 457 U.S. at 940.

The point that deference to state court determinations precludes the federal courts from reexamining

mere errors in the proceedings in the state courts, even when that determination would take place in the context of a claim purportedly made under 42 U.S.C. §1983, was also clearly made by Justice Stevens, dissenting, in the earlier case of *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 168 (1978), in which the majority found *no* state action:

> If there should be a deviation from the state statute — such as a failure to give the notice required by the state law — the defect could be remedied by a state court and there would be no occasion for §1983 relief. . . . Under this approach, the federal courts do not have jurisdiction to review every foreclosure proceeding in which the debtor claims that there has been a procedural defect constituting a denial of due process of law. Rather, the federal district court's jurisdiction under §1983 is limited to challenges to the constitutionality of the state procedure itself . . .

436 U.S. at 176-78 (Stevens, J., dissenting).

Here no claim is even attempted within the bounds of *Lugar* (assuming, *arguendo*, that it might apply beyond its terms). Plaintiff attempted to bridge the gap between private and state action solely by pleading a "joint venture," which turns out to be nothing more than a state trial judge entering judgments pursuant to a settlement and applying post-judgment execution procedures at a party's request. In *Lugar* this Court was careful to point out:

> [W]e do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the §1983 requirement of action under color of law."

457 U.S. at 939 n.21 (citation omitted). It then went on to limit its holding to pre-judgment attachment. And in *Dennis*, this Court noted that:

> Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.

449 U.S. at 28.

The Court of Appeals, by remanding this clearly inadequate §1983 claim, has ignored the decisions of this Court and has invited the filing and litigation of claims which were heretofore barred and which infringe upon the delicate balance between the state and federal courts.

C.

The cumulative import of the two aspects of the Court of Appeals' decision is to encourage multi-faceted collateral attacks on state court judgments in the federal district courts. That result runs counter to the teachings of a long series of decisions in which this Court 1) has defined, expansively, the circumstances in which a state court judgment is entitled to full faith and credit in a federal action; and 2) has limited the situations in which a federal court will entertain a claim seeking relief against private parties based on alleged constitutional violations in connection with state court litigation. The policies sought to be furthered by this Court's decisions are several. Relitigation of matters which were or could have been litigated in a prior action should not be favored. Concerns subtended under the notions of federalism and comity require that federal courts not intrude into state legal systems by serving as appellate bodies scrutinizing alleged errors or irregularities in state court litigation. Federal remedies should not be available against private parties merely because they have invoked state legal procedures except in carefully circumscribed situations in which their conduct can fairly be characterized as involving state action. And scarce federal judicial resources should not be expended on matters which rightly ought to be decided by the courts of the various states.

Inherent in these decisions is the conclusion that the larger principles which they express and implement outweigh the desirability of reviewing and correcting, in federal court, every error or omission in state court litigation which might be labeled by a disappointed litigant as a due process violation. Put differently, the perceived importance to a particular litigant of federal fact finding and federal characterization of the facts must often be subordinated to larger concerns critical in achieving the necessary balance between the federal and state judicial systems.

The motivation of the Court of Appeals in the present case is not in issue. It was obviously moved by the fact that neither the state court nor the federal district court had decided whether, in fact, Mrs. Boileau had been served with process in 1972 or had consented to Mr. O'Hare's entry of an appearance on her behalf or had consented to entry of judgments in settlement of the litigation. Yet each of these matters could have been examined and corrected, if indeed there is any substance to them, by direct state appellate review or by the filing of a timely challenge to the judgments. Mrs. Boileau's complaint cannot, therefore, be that she had no full and fair opportunity to litigate her claims; rather, her complaint derives from the fact that the manner and timing of her attempt to litigate them was held to be inappropriate under state law.

By vacating the summary judgment granted to petitioners under the original diversity complaint, the Court of Appeals has required the district court, sitting as if it were a state court, to entertain a challenge to the judgments, on the merits, which the state court system has deemed to be foreclosed. That decision, which does not depend at all upon the proposed addition, by amendment, of a claim under §1983, opens a wide number of opportunities for disappointed state litigants who can allege diversity of citizenship to force a hearing on the merits in federal court of their contentions with respect

to alleged procedural irregularities and errors leading to or in connection with judgments entered against them.

And as a practical matter, virtually the same result is reached by the separate determination by the Court of Appeals requiring allowance of the §1983 amendment. The same alleged procedural irregularities and errors are presumably to be considered as a possible basis for a §1983 claim.

Thus, whether sitting in diversity or sitting to resolve the federal claim, the district court will now be required to hear and determine questions which a state court system has deemed foreclosed to further review and which no opinion of this Court has ever considered appropriate for federal review. If this new kind of case is to enter the federal system, we respectfully suggest that it be by the invitation of this Court and not by the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, and a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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May 30, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.83-1251

LEONA P. BOILEAU,

Appellant

v.

BETHLEHEM STEEL CORPORATION, BERNARD V. O'HARE, ESQ., BLANK, ROME, KLAUS & COMISKY, JOANNE N. CASILIO, FERNANDO P. CASILIO and JOHN F. CASILIO, Co-partners t/a FRANK CASILIO & SONS, JOHN CHILTON, DOROTHY LORRAINE CHILTON, HENRY R. BANDELIN, MERRILE F. BANDELIN, WILLARD H. RENNINGER, ALICE F. RENNINGER, STEPHEN G. DONCEVIC, MARY D. DONCEVIC, DONALD F. EISMANN, HELEN O. EISMANN, BENJAMIN C. QUEEN and NORMA L. QUEEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(C. A. No. 78-2078)
Argued November 15, 1983
Before: ADAMS, BECKER and VAN DUSEN,
Circuit Judges
(Opinion Filed March 28, 1984)

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OPINION OF THE COURT

PER CURIAM.

This appeal raises difficult questions concerning the appropriate forum for the adjudication of a challenge to a consent decree alleged to have violated the due process rights of the plaintiff. The difficulties arise from the need to evaluate complex and interrelated claims brought before state courts and a federal district court sitting in diversity jurisdiction. In particular, this appeal requires that we determine what preclusive effect a state court denial of a petition to strike a judgment should have on a related federal court diversity action and the procedural right of a party to amend a complaint to reflect intervening changes of decisional law. The district court (a) held that a state court denial of a petition to strike barred diversity litigation on a collateral action, (b) denied a motion to amend the complaint, and (c) granted summary judgment for the defendants. We now vacate that judgment and remand this case for further proceedings.

I.

The present action arises as a challenge to a consent decree between Bethlehem Steel and Henry Boileau, the husband of the plaintiff. Mr. Boileau was an employee of Bethlehem Steel between 1957 and 1971, reaching the position of manager of real estate and municipal services prior to his departure. According to his affidavit of August 16, 1978, Boileau was directed by Bethlehem Steel

in 1968 to create a "slush fund" whereby corporate funds would "disappear" through a series of fictitious transactions and thereby become available for cash bribes. In his words, "I was responsible for bribery at all levels of government," particularly the city council aldermen of Chicago. App. at 228-29.[1]

According to Boileau, corporate funds were filtered through a number of companies which he set up to return untraceable cash to Bethlehem's coffers.[2] These transactions did not escape detection by the Internal Revenue Service, and on January 12, 1972, Boileau was indicted on four counts of tax evasion. *United States v. Boileau*, No. 72-17 (E.D. Pa. 1972). Immediately thereafter, on January 14, 1972, Bethlehem, charging embezzlement of company funds, initiated proceedings in the Common Pleas Court of Bucks County, Pennsylvania, against Boileau and these companies, as well as other individuals. *Bethlehem Steel v. Tri State Industries, Inc., et al.*, No. 72-355-05-1 (Ct. Common Pleas, Bucks County, 1972).

In his reply to Bethlehem's complaint, Boileau charged that the state court actions against him were instituted so that Bethlehem could avoid tax liability and forestall a threatened shareholder suit for diversion of corporate funds. Although Boileau claimed that all payments to his companies or to others were made with the authorization of his superiors, he nonetheless entered into a consent decree that ceded all his property to Bethlehem Steel. *Bethlehem Steel v. Tri State Industries,*

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1. In a criminal proceeding growing out of an investigation of the diversion of corporate money to create slush funds, Bethlehem Steel pleaded guilty to a nine-count information charging the company with having paid bribes to obtain ship building contracts. United States v. Bethlehem Steel, No. 80-C-431 (S.D.N.Y., July 24, 1980).

2. Because the district court granted summary judgment for defendants Bethlehem and Blank, Rome, we are required to resolve disputed facts in the light most favorable to plaintiffs.

Inc., Nos. 72-355-09-1, 72-356-09-2, 72-488-08-5 (Ct. of Common Pleas, Bucks County, June 21, 1972).

The consent decree also transferred to Bethlehem Steel all the joint property of Boileau and his wife, Leona Boileau, the plaintiff in the present action. The crux of Mrs. Boileau's claim is that at the time judgment was entered she and her husband were separated and that her share of jointly held property was conveyed to Bethlehem without her knowledge, without her consent, and without due process of law. She asserts that she was not a party to the 1972 proceedings and that the property transferred to Bethlehem was traceable, at least in part, to her own savings and not to any funds that ever belonged to Bethlehem Steel.

According to Mrs. Boileau's affidavit of May 6, 1982, she and her husband first purchased land in Barrington, New Jersey, on February 11, 1952; the purchase was made with the couple's joint savings. App. at 380-81. The Boileaus sold this property on June 18, 1958, and in 1961 purchased 99 acres of land in Northampton County, Pennsylvania. In 1965, the Boileaus sold ten acres of the Northampton property and purchased a Bucks County farm that was eventually conveyed to Bethlehem Steel, along with the remaining Northampton property. *Id.* These averments of Leona Boileau are supported in full by the affidavit of Henry Boileau of May 7, 1982. App. at 382-85. Significantly, he adds that the final real estate purchase made by the couple in 1965 occurred *prior* to his involvement with any of the companies named in either the 1972 tax evasion indictment or the 1972 suit filed against him by Bethlehem Steel.

In her affidavit of August 25, 1978, Leona Boileau declared that she moved from Pennsylvania to Providence, Rhode Island, on or about January 1, 1972. App. at 230. As of 1978, she worked as a clerical employee at Brown University, earning about $8,100 per year. She had lived with her sister since moving to Rhode Island, and, aside from the assets claimed in this law suit, she

had property worth less than $400. *Id.* At the time the present lawsuit was filed in 1978, Mrs. Boileau was 62 years old.

II.

Bethlehem Steel initiated an action in trespass and assumpsit against Henry Boileau in the Bucks County Common Pleas Court on January 14, 1972. On January 18, 1972, Bethlehem filed a second suit, this one in equity, against Henry and Leona Boileau seeking a lien against their properties in Bucks and Northampton Counties equal in value to the funds that Bethlehem alleged Henry Boileau had diverted. In particular Bethlehem's complaint in the equity suit claimed:

> [Henry] Boileau has made or caused the defendants to make extensive expenditures, *inter alia*, for rare and expensive antiques, horses, real estate, travel and business enterprises, domestic and foreign investments, and deposits in bank accounts. . . .

App. at 133. Mrs. Boileau was not named in the trespass and assumpsit action filed by Bethlehem.[3]

Mr. Boileau retained Bernard O'Hare, Esq., to represent him before the state court. Although Mrs. Boileau

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3. For a reason that was not explained, the Bucks County deputy sheriff filed a return of service showing that Mrs. Boileau was served with writs of summons in trespass and assumpsit on January 29, 1972. Not only was Mrs. Boileau not named on the writs, she also claims to have been out of the state at the time. The deputy sheriff also filed a return of service for the equity summons on January 31. Mrs. Boileau denies ever having been served any summons concerning the equity proceeding. App. at 230.

Moreover, Mrs. Boileau was dropped as a party defendant in Bethlehem Steel's amended complaint in equity filed March 16, 1972. App. at 119. She was restored to party status on May 24, 1972 in Bethlehem's amended complaint in equity. App. at 152. During the intervening period, Bethlehem proceeded with its equity suit against Mr. Boileau and the other named individuals and companies.

was not in Pennsylvania at the time and although she claims she was never served with process, Mr. O'Hare entered appearances on behalf of both Mr. and Mrs. Boileau. Mr. O'Hare subsequently acknowledged in court that Mrs. Boileau had not retained him and that his "appearance on behalf of Mrs. Boylou [sic] had been entered . . . on the assumption that I was authorized to do so." App. at 203. Mrs. Boileau claims, "I never asked or authorized Attorney O'Hare to represent me in that action or in any other legal matter." Affidavit of Leona Boileau, July 25, 1978; App. at 223.

In June 1972, Mr. Boileau and attorney O'Hare appeared before Judge William Hart Rufe III of the Bucks County Court, together with Edwin P. Rome, Esq., of the law firm of Blank, Rome, Klaus & Comisky, and other lawyers representing Bethlehem Steel. Judge Rufe, referring to the complexity and magnitude of the cases, encouraged the parties to settle the controversy. On June 21, 1972, Mr. Boileau and Bethlehem announced to the court that they were prepared to consolidate the two actions and settle the entire matter.[4] The settlement provided for the transfer of all property owned by Mr. and Mrs. Boileau to Bethlehem.[5] Judge Rufe entered judgment pursuant to the settlement on June 21.

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4. It appears that Mr. Boileau's decision not to contest this suit was premised, at least in part, upon his fear that any evidence he produced in his defense could be used against him in the criminal tax evasion case. The terms of the settlement may lend support to this hypothesis. The total amount the IRS claimed Boileau failed to report was $333,767.00, exposing him to a tax debt of $187,747.00. Presumably, the unreported amount was equal to the amount allegedly diverted from Bethlehem Steel. Yet the settlement was worth several times this amount. A plausible explanation may be found in the prison term of 20 years that Boileau faced in the criminal action.

5. The court thanked the parties for "working out this very complex and difficult problem," adding "this is really saving us all a great deal of money. . . ." App. at 188-189.

In her affidavit of July 25, 1978, Leona Boileau asserts the following:

3. Bethlehem Steel Corporation ("Bethlehem Steel") never served a complaint on me in the consolidated actions in Bucks County. I had no notice of the filing of the complaint against me before judgments were entered against me on June 21, 1972.

4. I now understand (but I did not know on or before June 21, 1972) that Bernard V. O'Hare, Esquire, filed a "praecipe for appearance" on February 18, 1972, purporting to appear on my behalf. I never asked or authorized Attorney O'Hare to represent me in that action or in any other legal matter.

5. I was not told of the proposal to have judgments entered against me prior to their entry on June 21, 1972, and I gave no consent to the entry of such judgments in advance.

6. After the judgments were entered on June 21, 1972, in about July, 1972, I came from Providence, Rhode Island, to Pleasant Valley, Bucks County, Pennsylvania at the request of my husband, Henry L. Boileau. Attorney O'Hare came to the home my husband and I had occupied before I moved to Rhode Island, and he told me for the first time that judgments had been entered against me in the Court of Common Pleas in Bucks County.

7. I protested that the entry of these judgments was without my knowledge or consent, that, up until that time, I was not aware of the allegations made against me by Bethlehem Steel, that the allegations were without any factual basis, that I refused in any manner to ratify these judgments after the fact, that Attorney O'Hare never represented me or had authority to act on my behalf, and that he had no authority in the future to represent me or act on my behalf.

> 8. Mr. O'Hare asked me to sign a release in favor of Bethlehem Steel, which he explained was part of the settlement worked out between Bethlehem Steel and my husband. I refused to sign this release.

App. at 222-24.

On July 17, 1972, Mr. O'Hare reported Mrs. Boileau's rejection of the terms of the consent decree to Bethlehem's counsel. Specifically, Bethlehem was informed that Mrs. Boileau would not agree to sign the deeds transferring her property to Bethlehem. According to a transcript of a hearing that took place before Judge Rufe on August 14, 1972, the parties had on July 21, 1972 alerted the court to Mrs. Boileau's refusal to participate. App. at 198. Judge Rufe designated August 14 as the date of the property transfer and directed the prothonotary of the court to convey the property in Mrs. Boileau's stead, should she not appear. The court's appointment of the prothonotary was pursuant to 21 Pa. Stat. Ann. §53 (Purdon 1982) which provides:

> In any proceedings at law or in equity, in any of the courts of this commonwealth having jurisdiction, if the said court shall order a conveyance to be executed by either of the parties to the said proceeding of his or her interest in any lands or tenements to any other party or person, and the party so ordered shall neglect or refuse to comply with the said order and make the said conveyance, or shall die, flee the jurisdiction, or become insane without having complied therewith, it shall be lawful for the said court to order and direct that such conveyance be made by the sheriff, prothonotary or clerk, or by a trustee specially appointed for that purpose. . . .

At the August 14 hearing, the court was informed that no formal notice of that day's proposed conveyance had been served on Mrs. Boileau. App. at 204-208. Notwith-

standing the lack of notice and Mr. O'Hare's specific disavowal of any authority to represent Mrs. Boileau, the court proceeded to direct conveyance of title of the Boileaus' property to Bethlehem, except that the sheriff rather than the prothonotary was ordered to sign the deed on Mrs. Boileau's behalf. App. at 209.

III.

According to the record, there were no further proceedings in this case until 1978. On June 20 of that year Mrs. Boileau, represented by counsel for the first time in any of these proceedings, took two separate actions: she filed a petition to strike the judgment in the Bucks County Court of Common Pleas, and she filed the present diversity action in federal district court. In the federal court action, defendants moved for summary judgment or, alternatively, for a stay of the proceedings, pending resolution of the state court action. On October 16, 1978, the federal court denied the summary judgment motion, but, on motion of the defendants, stayed its proceeding, pending final resolution of the petition to strike the judgment in state court.

A.

Mrs. Boileau presented her petition to strike the judgment to Judge Rufe. She claimed, first, that she had never been served and therefore that the court lacked jurisdiction to enter judgment against her and, second, that an unauthorized appearance had been filed on her behalf by Mr. O'Hare. The court determined that under Pennsylvania law, a motion or petition to strike could only be considered on the basis of facts appearing on the face of the record and that no additional evidence could be admitted. *Lipshutz v. Plawa*, 393 Pa. 268, 141 A.2d 266 (1958). On the face of the record, the court concluded:

> According to the Sheriff's return, the writ of summons in equity was served personally on Leona Boileau on January 31, 1972. Subsequently, Attorney Bernard V. O'Hare, Jr., entered an appearance on her behalf. Thus authorized, Attorney O'Hare negotiated a settlement agreement with Bethlehem on behalf of his clients. The agreement was submitted to and accepted by the Court and judgments were entered based thereon. Certain documents were later executed on her behalf, by order of Court, pursuant to statutory authority. . . .
>
> Leona Boileau's remaining challenges: that she was never served with a complaint; that she never received notice of the proposed entry of judgments; that no evidence was presented to support the allegations of the complaint; that there exists no factual or legal basis for the judgments and that Mrs. Boileau never consented to entry of the judgments, would require the Court to go beyond the face of the record. As a result, these challenges are inappropriately brought by a petition to strike the judgments.

Order and Opinion of June 6, 1979; App. at 239-41.

On appeal, the Superior Court of Pennsylvania took a more cautious approach to the question of Bernard O'Hare's unauthorized representation of Mrs. Boileau and the validity of the ensuing consent decree. *Bethlehem Steel Corp. v. Tri State Industries, Inc.*, 290 Pa. Super. 461, 434 A.2d 1236 (1981). The Superior Court found that the entry of an unauthorized appearance was not a jurisdictional defect and, therefore, did not automatically render any subsequent judgment void; rather, it said the consent judgment was voidable only. The Superior Court acknowledged that there was no case law governing "voidable" as opposed to "void" consent judgments. By analogy, however, the Superior Court turned to petitions to strike unauthorized confessed judgments entered into by one party to a partnership. *See Sterle v.*

Galiardi Coal and Coke Co., 168 Pa. Super. 254, 77 A.2d 669 (1951). Under the confessed judgment case law, the effects on the non-consenting party in the partnership of an otherwise binding confessed judgment could be voided upon timely and proper petition to the court. The confessed judgment doctrine, however, is premised upon the presumption of agency between partners acting in the name of a partnership. Despite the fact that the claimed absence of any relationship between Mr. O'Hare and Mrs. Boileau was the basis of the petition to strike and that this defeated any presumption of agency, the Superior Court proceeded to hold the doctrine of voidable judgments applicable to the present dispute. The Superior Court then accepted for the first time in a Pennsylvania case the tentative draft of the Restatement (Second) of Judgments that imposed a time bar to a petiton to strike. Thus, the Superior Court held that Judge Rufe's dismissal of the petition to strike because of the lapse of time was not erroneous; significantly, it made no reference to the merits of the dispute or to an equitable action to open. The Pennsylvania Supreme Court affirmed without opinion.

B.

The federal litigation arose in a different procedural posture than the state court proceedings. Rather than appearing as a defendant seeking relief from a judgment allegedly entered improperly, as she did in the state proceeding, Leona Boileau in the federal case is a plaintiff seeking compensatory and punitive damages against Bethlehem, its attorneys, and Bernard O'Hare.[6] Federal jurisdiction was premised on the diversity of citizenship between Mrs. Boileau, a Rhode Island resident, and the Pennsylvania defendants. 28 U.S.C. §1332 (1976). In

6. Mrs. Boileau also sought ejectment of those parties who purchased the contested land from Bethlehem Steel.

addition, following the resumption of the federal proceeding in March 1982, Mrs. Boileau sought to amend her complaint to invoke federal question jurisdiction under 28 U.S.C. §§1331 and 1343, based upon a claim that Bethlehem Steel, its attorneys, and Judge Rufe engaged in joint ventures violating Mrs. Boileau's civil rights protected by 42 U.S.C. §1983.

On March 14, 1983, the district court granted summary judgment in favor of Bethlehem Steel and Blank, Rome. The district court held Mrs. Boileau was barred by the res judicata effect of the state court judgments from pressing her claim against Bethlehem Steel and that collateral estoppel precluded relitigation of her entitlement to the real estate and the validity of the 1972 judgment. The district court — based solely upon "the protracted years of this complex litigation" — also exercised its discretion to deny Mrs. Boileau's motion to amend her complaint so as to state a cause of action under 42 U.S.C. §1983. *Boileau v. Bethlehem Steel,* No. 78-2078 (E.D. Pa. 1983) mem. op. at 15. The court expressed its belief that the §1983 action was without merit; however, its stated reasons for the denial of the amendment would appear to render this discussion dicta and therefore not controlling on the merits of the proposed amendment.[7]

IV.

Mrs. Boileau's federal action against Bethlehem Steel and the other named defendants raises complex issues of overlapping rights and remedies between state and federal court proceedings as well as the threshold requirement of state action necessary for a §1983 claim. Mrs. Boileau also alleges the potential compromising of

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7. The court denied Bernard O'Hare's motion for summary judgment. This appeal follows from the district court's entry of judgment for Bethlehem Steel and Blank, Rome under Fed. R. Civ. Pro. 54(b).

state court impartiality through campaign contributions to candidates for the judiciary by certain defendants while litigation was pending. We need not address these difficult issues today, except insofar as they are directly relevant to the district court's grant of summary judgment. The limited inquiry before us is, rather, (1) whether the state court judgment should properly have precluded a federal hearing on the merits of Mrs. Boileau's claim, and (2) whether the district court abused its discretion in not allowing amendment of the complaint.

A.

The central question in evaluating the district court's grant of summary judgment is whether Mrs. Boileau had a "full and fair opportunity" to litigate the issues presented on this appeal on the merits before the state tribunals. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982) (state court ruling must satisfy requirements of due process before it can be awarded full faith and credit); *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981) (final judgment on the merits basis for issue preclusion); *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980) (federal courts will adhere to principles of res judicata and collateral estoppel only when a final adjudication on the merits took place or could have taken place in state court); *Montana v. United States*, 440 U.S. 147, 153 (1979).

We need not be detained by considerations of comity in this case. Federal court jurisdiction was invoked in the first instance based upon diversity of citizenship, thereby placing the district court in the same posture as a state court reviewing a collateral attack upon a prior state court judgment. *Trust Co. of Chicago v. Pennsylvania R.R. Co.*, 183 F.2d 640 (7th Cir. 1950). Because federal courts sitting in diversity jurisdiction act as arbiters under state law, the comity or federalism concerns that might otherwise govern the relation of state and federal

proceedings on collateral matters have little or no bearing here. The justification for diversity jurisdiction is to allow an out-of-state plaintiff to receive a fair and impartial trial in a suit against a favored party of the forum state. Certainly this case, which involves a Rhode Island plaintiff and a large Pennsylvania corporation as the defendant, is a paradigm for diversity jurisdiction under the impartial tribunal rationale.

Under *Allen v. McCurry*, "collateral estoppel [and res judicata] cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the issue in the earlier case." 449 U.S. at 95. Thus, *Allen* limits the effects of the preclusion doctrines to cases in which state courts "have recognized the constitutional claims asserted and provided fair procedures for determining them." *Id.* at 99. *Allen* does not apply the doctrines of res judicata and collateral estoppel if state procedure in theory or practice was insufficient to allow full litigation of the constitutional claims pressed in the subsequent proceeding. *Id.* at 100-101.

Mrs. Boileau challenges the adequacy of the state procedures on three separate grounds. First, she claims that the crux of her appeal rests on the failure of service that deprived the Bucks County court of *in personam* jurisdiction combined with the unauthorized entry of an appearance on her behalf by Mr. O'Hare. A legitimate exercise of jurisdiction by the state court and an authorized claim by Mr. O'Hare to represent Mrs. Boileau in settlement discussions, she avers, were necessary predicates to the state court's entry of judgment against her. However, because Mrs. Boileau proceeded by petition to strike, which, under Pennsylvania law, is limited to the facts on the record, and because improper service and an unauthorized entry of appearance would not appear on the face of the record, we must conclude that the state court proceedings did not constitute "full and fair" adjudication of the failure of service issue or the question of

the unauthorized appearance entered by Mr. O'Hare and, therefore, did not resolve the merits of the dispute. Moreover, the governing Pennsylvania case law makes it clear that when a petition to strike is denied, there has been no adjudication on the merits of the dispute:

> While it is true the court might have treated the rule as one to open judgment and proceeded accordingly (Williams v. Notopolos, 247 Pa. 554, 93 Atl. 610), it was not bound to do so, and, in absence of a motion to amend, made by defendant, the rule was properly discharged, and such order is not in any sense a decision on the merits pleadable in bar of the present proceedings.

Bowman v. Berkey, 259 Pa. 327, 103 A.49, 51 (S. Ct. Pa. 1918).

Defendants in this action contend that even if the petition to strike did not afford Mrs. Boileau a full and fair opportunity to adjudicate the validity of the 1972 consent decree on the merits, she was obligated to file a motion to open in the state court. Ordinarily, where the federal action presents a collateral challenge to the validity of a state court ruling, this might be the case. We note, however, that the jurisdiction of the federal court was not invoked under a federal statute which allows for a challenge to the state court ruling. Rather, because Mrs. Boileau appears in federal district court under diversity jurisdiction, the federal tribunal stands in the same posture as a state court. Thus, there is no issue of failure to advance her claim in state court present here as an obstacle to federal court review. The filing of the federal action on the same day as the state court petition to strike preserved the federal diversity forum for adjudication on the merits of Mrs. Boileau's challenge to the 1972 consent order.[8]

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8. Under Pennsylvania common law the plaintiff had two procedural options to attack the 1972 state court judgment by matters

In view of these considerations, it appears that the district court in granting summary judgment did not sufficiently evaluate whether the prior adjudication resolved or could have resolved the merits of Mrs. Boileau's claims; moreover, it did not conduct a hearing to explore these issues in any respect. It simply stated:

> There is no doubt that there was a final judgment on the issue by the courts of Pennsylvania, and the plaintiff in this case was a party to the prior adjudication. The Bucks County court found that the plaintiff had a full and fair opportunity to litigate her claim in the state action and so stated in its opinion when the court denied her petition to strike the judgment.

Boileau v. Bethlehem Steel, No. 78-2078 (E.D. Pa. 1983) mem. op. at 11. The district court did not deal in any way with Mrs. Boileau's claim that the state court judgment was not on the merits. Instead, it proceeded to hold that her right to challenge the judgments under Pennsylvania procedures "had been forfeited by the extensive passage of time." *Id.* As the district court acknowledged, however, less than six years had elapsed from the entry of judgment in the Bucks County court to the filing of Mrs. Boileau's complaint in the federal diversity action. The district court thus contravened this Court's determination that under Pennsylvania law, "tort actions where bodily injury is not the gist of the complaint . . . would be subject to the six-year limitation period of 12 P.S. §31 [subsequently recodified as 42 Penna. Stat. §5527]." *Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir. 1978).

NOTE 8 — *(Continued)*
outside the record. She could (1) file a petition to open with the state court of original jurisdiction; or (2) *collaterally* attack the 1972 judgment by filing an action to restrain the judgment in another Pennsylvania state court. By filing a diversity action in federal court, Mrs. Boileau, in effect, chose the second option (i.e. to collaterally attack the 1972 judgment), but brought the action in federal court pursuant to 28 U.S.C. §1332.

The second point raised by Mrs. Boileau flows directly from the first. Under *Allen*, a litigant may be denied a federal forum for the assertion of federal constitutional rights, if a state tribunal has both "recognized the constitutional claims asserted and provided fair procedures for determining them. . . ." 449 U.S. at 99. Mrs. Boileau's complaint in the federal action specifically alleged a lack of constitutionally mandated due process in the state proceedings prior to 1978. This constitutional claim was not adjudicated on the merits under the Pennsylvania procedures available to consider a petition to strike a judgment because such adjudication would have required investigation beyond the face of the record.

Mrs. Boileau's third contention raises claims concerning the integrity of the state court proceedings. Whereas the first and second grounds challenge the "fullness" of the opportunity to litigate on the merits in the earlier proceedings as required by *Allen*, the third point questions the "fairness" component of the preclusion doctrine.[9] Mrs. Boileau's allegations chal-

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9. Specifically, Mrs. Boileau asserts that the law firm of Blank, Rome — a defendant in the present federal action and counsel to defendant Bethlehem Steel in the state proceedings — engaged in a practice of contributing substantial funds to the election campaigns of state court judges, including several involved in the present proceeding. Mrs. Boileau alleges that Blank, Rome either directly, through its lawyers, or through a political action committee, contributed to the election of Superior Court Judge Cavanaugh (the author of that court's opinion in *Bethlehem Steel v. Tri State Industries*) and three of the seven Pennsylvania Supreme Court Justices who actually considered Mrs. Boileau's appeal from the Superior Court holding. Of this latter group, Justice Nix is alleged to have received a $1,000 campaign contribution for re-election in November 1981 from the Blank, Rome Pennsylvania Political Action Committee; Mrs. Boileau's petition for allowance of further appeal was denied on November 30, 1981, shortly after the election for which the campaign contribution was made. In addition, Mrs. Boileau asserts that Justice Larsen was personally represented by Blank, Rome before a judicial inquiry board whose investigation was ongoing at the very time Mrs. Boileau's appeal was denied by the

lenge the fundamental integrity of the Pennsylvania state court system and, if accepted, would create a federal due process cause of action for every alleged victim of judicial impropriety in the state courts. This disturbing prospect, however, need not be addressed by this Court, at least in the present form of this appeal. In the present case, the allegations of judicial impropriety are not the basis of federal jurisdiction. Rather, having employed the diversity jurisdiction of the district court, Mrs. Boileau raised these allegations to forestall any res judicata/collateral estoppel effects of the prior adjudication. Since we hold that the district court erred on other independent grounds in its res judicata /collateral estoppel ruling, we do not reach the question whether this third point could, if substantiated, serve as an independent bar to the preclusion doctrines.

B.

Mrs. Boileau sought to amend her complaint upon resumption of the federal suit based on intervening changes in decisional law applicable to §1983 actions. When Mrs. Boileau's suit was originally filed in federal court the liability of private persons under §1983 was governed by *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970):

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents, [*quoting United States v. Price*, 383 U.S. at 794].

Subsequently, *Meyer v. Curran*, 397 F. Supp. 512 (E.D. Pa. 1975) held that a private individual who was deemed

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NOTE 9 — *(Continued)*
Pennsylvania Superior Court. Mrs. Boileau also asserts that Blank, Rome continued to represent Justice Larsen in a defamation suit against the *Philadelphia Inquirer*.

to have acted under color of state law together with a state official enjoyed the full immunities of that state official. *Meyer* thus limited liability under *Adickes* when the state official enjoyed immunity. Since the state action in the present case involved a state court judge enjoying absolute immunity, *see Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734-35 (1980) (and cases cited therein), *Meyer* could be read as precluding a §1983 action.

In November 1980, during the stay of the federal proceedings, the Supreme Court by implication reversed *Meyer*. Under *Dennis v. Sparks*, 449 U.S. 24, 29-32 (1980), the immunity of a state judge under §1983 was held not to extend to private collaborators acting under color of state law. Moreover, *Lugar v. Edmondson Oil*, 457 U.S. 922 (1982), found that when state foreclosure procedures are utilized by a private party acting with a state agent to seize property, such a seizure may constitute state action and therefore be actionable under §1983.[10]

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10. *Lugar* addressed the question whether a private party's invocation of Virginia's prejudgment attachment procedures was actionable under the "state action" requirement of the Fourteenth Amendment and the "under color of state law" requirement of §1983. Under *Lugar*, "[I]f the challenged conduct . . . constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under §1983." 457 U.S. at 935. Because the allegations in the proposed amended complaint concern the use of the state prothonotary signature procedure as well as joint action between Judge Rufe and the party defendants, it would appear that Mrs. Boileau has asserted a colorable claim under *Lugar*. The present panel of this court entertains some differences over whether the challenged state procedures must be unconstitutional on their face or simply as applied in order to fall within the ambit of §1983 claims defined by *Lugar*. Moreover, it is not clear whether the amended complaint challenges the underlying constitutionality of the Pennsylvania procedure or whether Mrs. Boileau simply claims a due process violation as that procedure was applied to her. In the absence of briefs or argument on these points, this issue is best left to the determination of the district court in the first instance.

The district court denied Mrs. Boileau's motion to amend her complaint based upon the changes in decisional law, ruling that

> the motion has been filed only after extended state court litigation and after the defendants had filed a motion for summary judgment. In my discretion, I do not feel it appropriate to permit the plaintiff to amend her complaint and to change her case at the last minute.

Mem. op. at 13.

The issue before this court is, therefore, whether the denial of the requested amendment of the complaint on timeliness grounds was an abuse of discretion by the trial court. We note as a preliminary matter that the stated basis for the denial of the amendment, the delay in the litigation, is a purely procedural decision by the trial court. There was no examination of the merits of the proposed amendment necessary for the determination that time and tide had brought the plaintiff to the end of her litigation lifeline. Given that this ruling effectively foreclosed reaching the merits of Mrs. Boileau's claim, the district court's decision must be weighed against the concerns for fundamental justice that undergird the Federal Rules of Civil Procedure.

While leave to amend a complaint under Rule 15(a) of the Federal Rules of Civil Procedure is generally within the discretion of the trial court, "[c]ourts have shown a strong liberality . . . in allowing amendments. . . ." 3 Moore's Federal Practice ¶15.08(2), quoted in *Heyl & Patterson Intern. v. F. D. Rich Housing*, 663 F.2d 419, 425 (3d Cir. 1981). The leading Supreme Court case on this subject, *Foman v. Davis*, 371 U.S. 178, 182 (1962), reflects the general presumption in favor of allowing a party to amend pleadings. The commentaries on Rule 15 amendments support not only a liberal interpretation of this rule, but specifically address the liberal use of Rule 15 to amend complaints so as to state additional causes

of action. *See Wright & Miller, Federal Practice & Procedure* §1474 (1975). In a matter brought before this court, for example, a false arrest action in the Virgin Islands was amended at the close of plaintiff's evidence to add a cause of action for false imprisonment. Although decided under Rule 15(c), this court upheld the amendments of the complaint even at that late hour. *Martin v. Virgin Islands National Bank*, 455 F.2d 985 (3d Cir. 1972).

Foman does however allow the amendment of a complaint to be denied when one of an enumerated set of factors — including undue delay — is present; the district court in the present case held that the delay in bringing the action after the 1972 settlement was a ground for denying the motion to amend. The district court pointed to the fact that an answer to the pleadings had aready been filed — specifically the defendant's motion for summary judgment in 1978. Although Rule 15(a) states that a party may amend a pleading once as a matter of course, this right ceases once the other side has delivered its responsive pleading. In Mrs. Boileau's case, however, this position obscures the fact that the summary judgment motion was filed in 1978 and was not acted upon. Instead, the case was stayed by the district court on defendants' motion, pending disposition of the state claim. Thus there was no harm in a motion to amend when the state court proceeding ended. Similarly, the delay exception in amending the complaint refers to delay in the actual proceeding in which the complaint occurs, not delay in bringing suit. Thus *Foman* couples the delay consideration with prejudice to the opposing party. Here, no prejudice was alleged or proved, and since the plaintiff moved to amend her complaint during the time between the filing of the state lawsuit and the 1982 lifting of the stay on the federal litigation, there is no indication of prejudice.

The liberal rules of amendment of complaints are premised on the express concern for the "just, speedy,

and inexpensive determination of every action." Fed. R. Civ. Pro. 1. While it is within the discretion of a trial judge to prevent the abusive use of amendment to delay or prolong litigation, it is quite a different matter for the discretionary denial of amendment to be used to preclude a plaintiff from the federal forum altogether. Particularly where the underlying claim involves the deprivation of fundamental constitutional rights, discretionary procedural measures should be cautiously employed when denying a litigant her day in court.

We must therefore conclude that the district court erred in not permitting amendment of the complaint.

V.

For the foregoing reasons, the judgment of the district court will be vacated and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1251

LEONA P. BOILEAU,

Appellant

v.

BETHLEHEM STEEL CORPORATION, et al.
(C.A. No. 78-2078)

Before: ADAMS, BECKER and VAN DUSEN,
Circuit Judges

ORDER AMENDING OPINION

IT IS ORDERED that the slip opinion in the above matter, filed on March 28, 1984, is hereby amended as follows:

Footnote 9 on page 18 should read:

Mrs. Boileau asserts that at or about the time the case was proceeding in the state appellate courts, the defendant law firm — a defendant in the present action and counsel to defendant Bethlehem Steel in the state proceedings — contributed substantial funds to the election campaigns of state court judges, including several involved in the state court adjudication of this matter, and that at the same time the defendant law firm also represented one of the Justices of the Pennsylvania Supreme Court in various legal matters.

The second sentence on page 19 should read:

This matter, however, need not be addressed by this Court, at least in the present stage of this appeal; indeed

it is not clear that the matter was appropriately presented in the district court.

By the Court,

/s/ Arlin M. Adams

Circuit Judge

Dated: May 1, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1251

BOILEAU, LEONA P., Appellant
v.
BETHLEHEM STEEL CORPORATION, et al.
Present: ADAMS, BECKER and VAN DUSEN, *Circuit Judges*

1. Motion of Bethlehem Steel Corporation and Blank, Rome, Comisky and McCauley to amend the Opinion of March 28, 1984.

in the above-entitled case. Any answer which would be due April 18, 1984 will be forwarded to you upon receipt.

Respectfully,

Clerk

The foregoing Motion is denied.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: May 2, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONA P. BOILEAU	:	
	:	
v.	:	CIVIL
	:	ACTION
	:	NO. 78-2078
BETHLEHEM STEEL CORPORATION,	:	
BERNARD V. O'HARE, ESQUIRE,	:	
BLANK, ROME, KLAUS & COMISKY,	:	
JOANNE N. CASILIO,	:	
FERNANDO P. CASILIO and	:	
JOHN F. CASILIO, Co-partners	:	
trading as Frank Casilio &	:	
Sons, JOHN CHILTON,	:	
DOROTHY LORRAINE CHILTON,	:	
HENRY R. BANDELIN,	:	
MERRILE F. BANDELIN,	:	
WILLARD H. RENNINGER,	:	
ALICE F. RENNINGER,	:	
STEPHEN G. DONCEVIC,	:	
MARY D. DONCEVIC,	:	
DONALD F. EISMANN,	:	
HELEN O. EISMANN,	:	
BENJAMIN C. QUEEN and	:	
NORMA L. QUEEN	:	

MEMORANDUM OPINION

CAHN, *J.* March 10, 1983

This case is before the court on a series of motions filed by the various defendants and also by the plaintiff. Before consideration of the issues raised by the motions it is necessary to set forth certain background information concerning the lengthy legal proceedings that have occurred in this matter.

The plaintiff, Leona P. Boileau, filed a complaint[1] in this action on June 20, 1978, against multiple defendants.[2] Contemporaneously, the plaintiff also filed a Petition To Strike Off Judgments in the Court of Common Pleas of Bucks County, Pennsylvania. On October 16, 1978, I stayed the proceedings in the present case and placed it in suspense pending final resolution of the plaintiff 's state court petition. Thereafter, both the trial and appellate courts of Pennsylvania denied plaintiff 's petition. I then ordered a hearing and argument on April 26, 1982, to consider the outstanding motions filed in this case.

Plaintiff filed her Petition To Strike approximately six years after the conclusion of litigation which had arisen in 1972 when the Bethlehem Steel Corporation (Bethlehem) commenced suit in the Court of Common Pleas of Bucks County against the plaintiff, her husband, Henry Boileau, and numerous corporate entities connected with the Boileaus for the recovery of money allegedly diverted from Bethlehem. In the 1972 litigation, Attorney Bernard V. O'Hare, a defendant in the within case, had entered his appearance on February 18, 1972, on behalf of both Mr. and Mrs. Boileau. There is a factual dispute whether or not Mrs. Boileau authorized Mr. O'Hare to represent her. According to Mr. O'Hare, he had such authority; according to Mrs. Boileau, he did not. Opposing parties on this issue have filed supporting

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1. Subject matter jurisdiction is founded on a controversy in an amount in excess of $10,000.00 and diversity of citizenship between plaintiff and all defendants. 28 U.S.C. §1332.

2. The defendants named in this complaint are Bethlehem Steel Corporation, Bernard V. O'Hare, Esquire, Blank, Rome, Klaus & Comisky, Joanne N. Casilio, Fernando P. Casilio and John F. Casilio, Co-partners trading as Frank Casilio & Sons, John Chilton, Dorothy Lorraine Chilton, Henry R. Bandelin, Merrile F. Bandelin, Willard H. Renninger, Alice F. Renninger, Stephen G. Doncevic, Mary D. Doncevic, Donald F. Eismann, Helen O. Eismann, Benjamin C. Queen and Norma L. Queen.

papers, including deposition transcripts and affidavits, to substantiate their respective positions.

In June of 1972, Mr. Boileau and Mr. O'Hare discussed settlement of the lawsuit, and they arrived at a proposal to present to Bethlehem. These discussions between Mr. Boileau and his attorney, who claims he was also representing Mrs. Boileau, and then with Bethlehem resulted in a settlement agreement which provided for the entry of a money judgment against Mr. and Mrs. Boileau in the approximate amount of $800,000 and the conveyance by Mr. and Mrs. Boileau of valuable rural real estate to Bethlehem. It also included a concession obtained from Bethlehem "to work out satisfactory arrangements for Mr. and Mrs. Boileau to continue living" at their home pending the sale of the real estate. Pursuant to the settlement agreement a hearing was held on June 21, 1972, in the Court of Common Pleas of Bucks County before Judge William Hart Rufe, III. Since Mrs. Boileau was not present, Mr. O'Hare represented that her signature would be obtained after the hearing.

When Mr. Boileau and Mr. O'Hare met with Mrs. Boileau to explain to her the terms of the settlement and obtain her signature on the documents, she informed the defendant, O'Hare, that he did not represent her, and that she would not ratify or accept the settlement.

A hearing scheduled by Judge Rufe in July of 1972 was cancelled and was later rescheduled for August 14, 1972. At that hearing, Mr. O'Hare informed Judge Rufe that Mrs. Boileau had told him that he had no authority to act on her behalf. These representations by Mr. O'Hare were made in open court and in the presence of Mr. Boileau. Mr. O'Hare also informed the court that he had assumed he was representing both Mr. and Mrs. Boileau and that Mr. Boileau had instructed him to enter an appearance on behalf of both.

At the hearing on August 14, 1972, Mrs. Boileau did not appear personally or through an attorney. At the completion of the hearing and after considering the in-

formation proffered to the court, Judge Rufe ordered and decreed that the real estate in question be conveyed to Bethlehem pursuant to the authority granted in 21 Purdon's Statutes §53. In accordance with this order, certain conveyances were signed by Mr. Boileau and by the Sheriff of Bucks County on behalf of Mrs. Boileau.

Thereafter, certain third parties (individuals) purchased the real estate from Bethlehem. These third parties (15 in number) are also defendants in the present action. At the hearing before me on April 26, 1982, all counsel agreed that these third party purchasers should be dismissed from this lawsuit. Consequently, the complaint against these fifteen defendants will be dismissed.

In her state court Petition, Mrs. Boileau contended that the judgments were void and invalid as to her since they were procedurally incorrect and substantively insufficient. Defendant Bethlehem answered Mrs. Boileau's state court Petition by asserting that the record showed no irregularities and that Mrs. Boileau had failed to establish the elements necessary to strike the state court judgments or to invoke the equitable power of the court to open the judgments.[3]

After the stay in the federal action, both Bethlehem and Mrs. Boileau filed praecipes with the Court of Common Pleas of Bucks County requesting that Mrs. Boileau's Petition to Strike be submitted to that court for disposition. At the same time, Mrs. Boileau filed in the state court a motion for summary judgment on the Petition To Strike and filed Preliminary Objections to Bethlehem's Amended Complaint. The Court of Common Pleas of Bucks County denied Mrs. Boileau's request to strike off the judgments, and rejected each of Mrs. Boileau's challenges to the record, primarily because of unexcused delay in filing her Petition. It upheld

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3. Mrs. Boileau did not pursue in the state court action the remedy of opening the judgment. Bethlehem Steel Corp. v. Tri State Ind., 290 Pa. Super. 461, 469 (1981).

Bethlehem's judgments against Mrs. Boileau and found them to be valid and binding. The court further determined that a summary judgment motion was an unnecessary and improper procedure for resolving the issues presented by the Petition and that the Preliminary Objections to the Amended Complaint were untimely filed.

The Superior Court of Pennsylvania unanimously affirmed the denial of Mrs. Boileau's Petition and subsequently denied the Petition by Mrs. Boileau for reconsideration. *Bethlehem Steel Corp. v. Tri State Ind.*, 290 Pa. Super. 461 (1981). On November 30, 1981, the Supreme Court of Pennsylvania entered its order denying Mrs. Boileau's Petition for allocatur.

At this juncture, then, the case has returned to the fold of the federal court. The federal complaint seeks an adjudication regarding Mrs. Boileau's claimed interest in the real estate and also challenges the validity of the 1972 judgments entered against her. The plaintiff claims that she did not retain Mr. O'Hare and had not authorized Mr. O'Hare to enter his appearance on her behalf. She seeks money damages from Bethlehem, Bethlehem's attorneys in the 1972 state court action and Mr. O'Hare. I will now deal with the pending motions.

I. RES JUDICATA AND COLLATERAL ESTOPPEL

The court will first consider the motion of defendants, Bethlehem and Blank, Rome, Comisky and McCauley (Blank, Rome), attorneys for Bethlehem, for summary judgment based on their argument that the doctrines of res judicata and collateral estoppel preclude relitigation of the matters now raised by the plaintiff in the federal court.

As stated in *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980):

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their

privies from relitigating issues that were or could have been raised in that action . . . Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in the suit on a different cause of action involving a party to the first case . . . As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. . . .

In recent years, this Court has reaffirmed the benefits of collateral estoppel in particular, finding the policies underlying it to apply in context not formerly recognized at common law . . .

The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts . . . Thus, res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system . . .

. . . Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . . (citations omitted).

In recognizing the principle that there must be an end to litigation under policies that have been adopted by the Congress of the United States and by the Supreme Court of the United States, the Court recently held that the doctrine of repose ". . . is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which

should be cordially regarded and enforced by the courts . . ." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

As a result of the Pennsylvania Superior Court affirming the state court below, the 1972 judgments have been sustained and the state court system has rejected Mrs. Boileau's petition to strike the judgment. The issues raised by Mrs. Boileau in her federal action have now been resolved with finality, and the doctrines of res judicata and collateral estoppel preclude relitigation in this court. I, therefore, will grant summary judgment in favor of Bethlehem and Blank, Rome. I have done so only after reviewing the voluminous briefs and exhibits presented to the court by the parties to this action and after reviewing the opinions of the lower state court and of the Superior Court of Pennsylvania.

With respect to Bethlehem, all the factors required under the doctrine of res judicata are present in this action. Those requirements are:

> (1) The identity of the theory sued upon;
> (2) Identity of the cause of action;
> (3) The identity of persons and parties to the action; and
> (4) Identity of quality or capacity of the parties suing or being sued.

Kelly v. Warminster Tp. Bd. of Sup'rs, 512 F.Supp. 658, 662 (E.D. Pa. 1981), *aff'd mem.*, 681 F.2d 806 (3d Cir.), *cert. den.*, ____ U.S. ____, 74 L.Ed.2d 74 (1982).

Under the doctrine of collateral estoppel, both Bethlehem and Blank, Rome are entitled to summary judgment because plaintiff is precluded from having the issue of her entitlement to the real estate and the validity of the money judgment adjudicated anew. The components of collateral estoppel are as follows:

> (a) The issue decided in the prior adjudication must be identical with the one presented in the later action;

(b) There must have been a final judgment on the merits;

(c) The party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication; and

(d) The party against whom it is asserted must have had a full and fair opportunity to litigate the issue in question in the prior action.

Kelly v. Warminster Tp. Bd. of Sup'rs., supra, at 658, 664; *accord, Pub. Serv. Mut. Ins. Co. v. Cohen*, 616 F.2d 704, 707 (3d Cir. 1980). I find that all the requirements mentioned above have been met in this case to both Bethlehem and Blank, Rome.

Both of the cases, federal and state, stem from the same set of facts, and the issue — the validity of judgments affecting Mrs. Boileau's property rights — is identical. There is no doubt that there was a final judgment on the issue by the courts of Pennsylvania, and the plaintiff in this case was a party to the prior adjudication. The Bucks County Court found that the plaintiff had a full and fair opportunity to litigate her claim in the state action and so stated in its opinion when the court denied her petition to strike the judgment.

The plaintiff claims the state court judgments were not on the merits in that her petition to strike was merely "untimely". However, in reviewing the opinions of the state courts it is more accurate to state that the plaintiff's right to challenge the judgments under the procedure permitted by Pennsylvania law had been forfeited by the extensive passage of time. (Nearly six years elapsed from the time of the final judgment in the state court until the plaintiff took action to strike the judgment).

The plaintiff further argues that the Bucks County Court did not have personal jurisdiction over her during the time of the litigation concerning the subject of this suit. Nevertheless, the Pennsylvania courts determined specifically that they did have personal jurisdiction over

Mrs. Boileau.[4] As stated in the Superior Court opinion, *Bethlehem Steel Corp. v. Tri State Ind.*, 290 Pa. Super. 461, 471 (1981): "Here the lower court had jurisdiction of the subject matter and had jurisdiction over the parties."

Since all the tests concerning the doctrines of res judicata and collateral estoppel have been met, I shall grant summary judgment in favor of Bethlehem and in favor of Blank, Rome and against the plaintiff on her existing federal complaint.

II. PLAINTIFF'S MOTION FOR LEAVE TO SERVE AN AMENDED COMPLAINT

Plaintiff has moved, pursuant to Fed. R. Civ. P. 15, for leave to file and serve an amended complaint. The basic change in the amended complaint from the original complaint is the inclusion of a claim under Title 42 U.S.C. §1983, the civil rights statute. For the reasons stated hereafter, the motion of the plaintiff to serve an amended complaint will be denied.

Leave to amend a complaint is within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971). Although the rule provides that leave is to be freely given when justice so requires, a mere request is not an automatic grant. In deciding on such a motion, the trial court "[is] to consider factors like untimeliness, undue delay, bad faith, futility, and prejudice to adverse parties." *Robinson v. Cuyler*, 511 F.Supp. 161, 165 (E.D. Pa. 1981). In the present case, the motion has been filed only after extended state court litigation and after the defendants

4. Mrs. Boileau did not claim in the state court proceeding that the procedure available in the state courts of Pennsylvania for striking judgments, where a defendant claims lack of *in personam* jurisdiction, violates the due process clause of the Fourteenth Amendment. Neither does she make that claim here, nor could she, because the basis for the state court decision rests on her unexcused failure to proceed in a timely manner after she knew of the entry of the judgments.

have filed a motion for summary judgment. In my discretion, I do not feel it appropriate to permit the plaintiff to amend her complaint and to change her case at the last minute. *See Carey v. Beans*, 500 F.Supp. 580, 582 (E.D. Pa. 1980), *aff'd mem.*, 659 F.2d 1065 (3d Cir. 1981); *see also, Marshall v. Heringer Ranches, Inc.*, 466 F.Supp. 285, 293 (E.D. Cal. 1979), *aff'd sub nom., Donovan v. Heringer Ranches, Inc.*, 650 F.2d 1152 (9th Cir. 1981).

I have made my decision in this matter based on the discretion granted to me and on my overall feeling concerning this protracted litigation. In exercising my discretion, I have concluded that at this late stage of the proceedings, a substantial amendment to the Complaint should not be permitted. I do not consider it necessary or even appropriate to discuss at great length whether or not the new claims under the Civil Rights Act are insufficient as a matter of law.[5] However, I do think it is appropriate to point out that the plaintiff certainly has had her day in court concerning the matters which appear to be her main complaints supporting her theory of a civil

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5. A factor I have considered in determining not to exercise my discretion to allow the amended complaint is the serious problem concerning the state action requirement under 42 U.S.C. §1983. None of the defendants in this case can be considered a state actor. Although this court is not unfamiliar with the holding of Dennis v. Sparks, 449 U.S. 24, 27-28 which states that "[p]rivate persons, jointly engaged with state officials . . . are acting 'under color' of law for purposes of §1983 actions", there is a failure in this lawyer-drafted Amended Complaint to allege any *conspiratorial* activity between the private defendants and the state actor. In Dennis, *id.*, the Court stated at 449 U.S. 28: "Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." A careful review of the "Acts Complained Of" in plaintiff's proposed Amended Complaint, especially paragraphs #11, 18, 20, and 21 thereof which concern the activities of the trial judge, reveals no allegations of an actionable conspiracy. Hence, I would find no state action and, therefore, no valid claim under 42 U.S.C. §1983.

rights action under 42 U.S.C. §1983. In her petition to strike off the judgments to the Court of Common Pleas of Bucks County, Pennsylvania, in paragraph 7 thereof, she stated:

> 7. The judgments were entered against Mrs. Boileau in violation of the Pennsylvania Rules of Civil Procedure and her rights to *due process of law, guaranteed by the constitutions of the United States* and of the Commonwealth of Pennsylvania, and are therefore nullities. (emphasis added)

Then in paragraphs 12 and 18 of the proposed amended complaint, under acts complained of, the plaintiff states:

> 12. The judgments were entered against Mrs. Boileau without rudimentary elements of *due process of law* such as notice of the allegations against her and notice of hearing, and without her consent, without basis in evidence, and without legal or factual justification. (emphasis added)

> 18. Judge Rufe's action in ordering Sheriff Jones to sign deeds was in clear violation of Pennsylvania law and the *due process clause of the Fourteenth Amendment of the Constitution of the United States*. Judge Rufe's action was taken at the request of Blank, Rome, acting for and with the knowledge of Bethlehem Steel. (emphasis added)

Although the opinions of the state courts do not particularly discuss the alleged violations of the due process clauses, the plaintiff has had the opportunity to present such matters to the state courts and did so in her petition to strike off the judgments. The state courts subsequently tendered a complete adjudication on the petition and made their decision. After the protracted years of this complex litigation, I am not inclined at this time to give my discretionary approval for leave to file this amended complaint. The factual circumstances of the

case and the law discussed in prior paragraphs lead me to the conclusion that this litigation appropriately should now see its end, at least with respect to the claims against Bethlehem and Blank, Rome. An appropriate order will be entered.

III. STATUTE OF LIMITATIONS

The defendant O'Hare has filed a Motion for Summary Judgment against the plaintiff based on seven theories of law, only one of which, the statute of limitations' argument, will be discussed in this opinion. The other theories for finding in favor of O'Hare on his motion are rejected at this time without further comment. It is to be noted that the plaintiff has filed a Motion for Partial Summary Judgment against defendant O'Hare which is supported merely by a brief containing one short conclusory paragraph. I will deny both O'Hare's motion and plaintiff's motion.

The proper application of the Pennsylvania statute of limitations to the present set of circumstances is a complex matter, although the dates for various occurrences in this action are not in dispute. The entry of judgment of which plaintiff complains came on June 21, 1972. On June 20, 1978, one day short of six years, the plaintiff commenced the present action. I conclude that the statute of limitations began to run on June 21, 1972, upon the entry of the judgment against the plaintiff and that, consequently, the complaint against O'Hare was filed within the appropriate statutory framework of six years.

A brief background discussion of the Pennsylvania statute of limitations is appropriate in this discussion. The colonial statute of limitations, Act of March 27, 1713, 1 Sm.L. 76 §1, 12 P.S. §31, at one time governed all actions brought in the courts of the Commonwealth of Pennsylvania. That act provided, *inter alia*, that all actions of trespass "shall be commenced and sued within the time and limitation hereafter expressed, and not

after; that is to say . . . within six years next after the cause of such actions. . . ."[6] In 1895, the legislature passed the Act of June 24, 1895, P.L. 236, §2, 12 P.S. §34, which reduced the period during which actions for personal injuries could be brought from six years to two. This latter statute held "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in a case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards. . ." This Act of 1895 made no reference to the earlier Act of 1713. Nevertheless, as stated in *Walker v. Mummert*, 394 Pa. 146, 148 (1958), the court held that in the prior case of *Peterson v. Delaware River Ferry Co.*, 190 Pa. 364 (1899), it was decided that the later Act, "insofar as relevant [had] impliedly repealed the earlier enactment."

Under the dictates of *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894 (3d Cir. 1977), and *Davis v. United States Steel Supply, Etc.*, 581 F.2d 335 (3d Cir. 1978), I have examined the relief requested by the plaintiff from defendant O'Hare. Although the allegations as to plaintiff's claim against O'Hare are not overly articulate or detailed, they appear to state facts that encompass a tort involving an action for wrongful interference with economic relations. Also, the plaintiff is seeking only money damages from said defendant. As stated in *Davis v. United States Steel Supply, Etc., id.*, at 339, tort actions which involve the wrongful interference with another's economic rights or interests, "where bodily injury is not the gist of the complaint or the basis of damages would not be within the precise terms of 12 P.S. §34 and they would be subject to the six-year limitation period of 12 P.S. §31." *See also Skehan v. Bd. of Trustees of Bloomsburg State Col.*, 590 F.2d 470 (3d Cir. 1978), *cert. den.*, 444 U.S. 832 (1979).

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6. Trespass actions for assault, menace, battery, wounding and imprisonment were subject to a two-year limitation period in 12 P.S. §31.

However, to the extent that there is any claim by the plaintiff for emotional distress resulting from the alleged misconduct of defendant O'Hare, such claim is dismissed under terms of 12 P.S. §34 for failure to bring such action within a two-year period. *See West v. Williamsport Area Com. College*, 492 F.Supp. 90, 96-97 (M.D. Pa. 1980).

For the reasons stated above, I conclude that the Pennsylvania six-year statute of limitations shall apply to the main claims brought by the plaintiff against defendant O'Hare, and that subsequently, said defendant's motion for summary judgment will be denied.[7]

An appropriate order will be entered.

BY THE COURT:

Edward N. Cahn, J.

7. The court has applied the appropriate statute of limitations that was in effect at the time that the lawsuit was brought in this case rather than the presently revised statute of Pennsylvania as found in the Judicial Code. *See* Act of July 9, 1976, P.L. 586, Act No. 142 §2, 42 Pa. Stat. Ann. §§5501-5574. This new act did not take effect until June 27, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONA P. BOILEAU	:	CIVIL
	:	ACTION
v.	:	NO. 78-2078
	:	
BETHLEHEM STEEL CORPORATION,	:	
BERNARD V. O'HARE, ESQUIRE,	:	
BLANK, ROME, KLAUS & COMISKY,	:	
JOANNE N. CASILIO,	:	
FERNANDO P. CASILIO and	:	
JOHN F. CASILIO, Co-partners	:	
trading as Frank Casilio &	:	
Sons, JOHN CHILTON,	:	
DOROTHY LORRAINE CHILTON,	:	
HENRY R. BANDELIN,	:	
MERRILE F. BANDELIN,	:	
WILLARD H. RENNINGER,	:	
ALICE F. RENNINGER,	:	
STEPHEN G. DONCEVIC,	:	
MARY D. DONCEVIC,	:	
DONALD F. EISMANN,	:	
HELEN O. EISMANN,	:	
BENJAMIN C. QUEEN and	:	
NORMA L. QUEEN	:	

ORDER

AND NOW, this 10th day of March, 1983, IT IS ORDERED that:

1. The motion of defendants, Bethlehem Steel Corporation and Blank, Rome, Comisky & McCauley, for summary judgment is GRANTED. Upon an express determination that there is no just reason for delay, I expressly enter judgments under Fed. R. Civ. P. 54(b) in favor of Bethlehem Steel Corporation against plaintiff and in favor of Blank, Rome, Comisky & McCauley against plaintiff.

2. The motion of defendant, Bernard V. O'Hare, for summary judgment is DENIED.

3. The complaint against all the remaining defendants as listed in the caption to the complaint is DISMISSED.

4. Plaintiff's motion for partial summary judgment against defendant, Bernard V. O'Hare, is DENIED.

5. Plaintiff's motion to serve amended complaint is DENIED.

6. Counsel for plaintiff and for defendant O'Hare are directed to attend a conference with the court in Courtroom 3B, United States Courthouse, Philadelphia, Pennsylvania, on Monday, March 21, 1983, at 9:15 A.M.

BY THE COURT:

_____

Edward N. Cahn, J.

COURT OF COMMON PLEAS OF
BUCKS COUNTY — CIVIL

BETHLEHEM STEEL CORP.	:	No. 72-355-09-1
v.	:	
TRI-STATE INDUSTRIES, INC., et al.	:	

OPINION and ORDER

In these consolidated actions, defendant Leona P. Boileau has filed, in chronological order, a petition to strike off judgments, a motion for summary judgment and preliminary objections to plaintiff's amended complaint in equity, all to be decided pursuant to Bucks County Rule of Civil Procedure *266. We deal with defendant's applications in reverse order for clarity.

On February 22, 1979, defendant filed preliminary objections to the amended equity complaint filed by plaintiff on May 24, 1972. Not only are these objections in excess of six years late,[1] but they come after judgments have been entered of record and while a petition to strike those judgments is pending. Accordingly, these untimely and otherwise improper objections must be denied.

Defendant has also filed a motion "for summary judgment on petition to strike judgments." This is likewise improper. A motion for summary judgment under Rule 1035 of the Pennsylvania Rules of Civil Procedure is addressed to the merits of the underlying action and is appropriate "[a]fter the pleadings are closed . . ."[2] to provide the moving party in a proper case with "judgment as a matter of law."[3] In the instant case a settlement agreement was entered of record before the close of the pleadings and, therefore, it was unnecessary for the Court to decide the underlying merits of the action. Further, as to defendant's petition to strike judgments,

1. Pa. R.C.P. 1026.
2. Pa. R.C.P. 1035(a).
3. Pa. R.C.P. 1035(b).

Bucks County Rule of Civil Procedure *266 sets up the appropriate mechanism to bring that petition before the Court. Accordingly, we must dismiss defendant's "motion for summary judgment" as procedurally inappropriate. Finally, inasmuch as defendant has filed a praecipe and a memorandum in support of her motion to strike judgments, we may now proceed to that issue.

It is well settled in Pennsylvania that:

> "A motion to strike a judgment, as opposed to a petition to open a judgment and be let into a defense, [footnote omitted] will not be granted unless a fatal defect in the judgment appears *on the face of the record. Weinberg v. Morgan,* 186 Pa. Superior Ct. 322, 325, 142 A. 2d 310, 312 (1958). As we said in *Lipshutz v. Plawa,* 393 Pa. 268, 271, 141 A. 2d 226, 228 (1958); 'A rule to strike off a judgment is in the nature of a demurrer directed to defects in the record. If the record is self-sustaining, the judgment cannot be stricken.' " (Emphasis original) *Washington County Controller's Case,* 427 Pa. 631, 634, 235 A. 2d 592, 594 (1967). See also *Malakoff v. Zambar, Inc.,* 446 Pa. 503, 506, 288 A. 2d 819, 821 (1972).

Accordingly, in searching for defects which may render the judgments in this action invalid, we are limited to a review of the face of the record. *Lipshutz v. Plawa,* 393 Pa. 268, 141 A. 2d 266 (1958).

Bethlehem Steel Corporation ("Bethlehem") began this unusual and complex litigation in January of 1972 by instituting three suits in Bucks County, namely: No. 72-355-09-1, In Assumpsit; No. 72-356-09-1, In Trespass; and No. 72-488-08-5, In Equity. Each action was instituted by writ of summons and Leona Boileau was a named defendant only in the Equity action. The Sheriff's return shows that the writ of summons in the Equity action was served personally on Mrs. Boileau on January 31, 1972 at her residence in Pleasant Valley, Bucks

County, Pennsylvania, and further shows that she accepted service on behalf of her husband, Henry L. Boileau as is authorized by Pa. R.C.P. 1009(b)(2)(1). On March 15, 1972, Attorneys Bernard V. O'Hare and C. William Freed, Jr., filed of record an entry of appearance on behalf of "Henry L. Boileau and Leona P. Boileau, his wife."[4]

The next day, Bethlehem filed a complaint in equity, which it amended on May 24, 1972 to include Leona Boileau as a named defendant. The amended complaint, in two counts, alleged that Henry Boileau, a former Bethlehem employee, had conspired with others to defraud Bethlehem by having invoices for non-existent services submitted to and paid by Bethlehem, such payments actually going to or benefitting defendants. Bethlehem alleged that it was the equitable owner of all property acquired by defendants Boileau by use of misappropriated Bethlehem funds including certain real estate in Bucks and Northampton Counties, Pennsylvania.[5]

On June 21, 1972, additional parties having been joined in the meantime in the equity action, Attorney O'Hare filed of record in each action another entry of appearance, this time for Henry L. Boileau and Leona P. Boileau and Continental International Associates, Ltd. and Pennsylvania Thoroughbred Horse Sales Co. That same day, counsel for all parties having diligently worked to settle the entire matter, a hearing was held at which time the settlement agreement was entered of record by counsel for plaintiff and by Bernard V. O'Hare

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4. The writs of summons in assumpsit and trespass were served on Henry L. Boileau for himself and for his wife, even though Mrs. Boileau was not a named defendant in those suits. Attorneys O'Hare and Freed entered an appearance for Mr. Boileau only on March 15, 1972, in the assumpsit and trespass actions.

5. The assumpsit and trespass complaints filed by Bethlehem contain essentially the same averments as set forth in the equity complaint, but set forth different theories for relief.

on behalf of the Boileaus and certain corporations. Henry Boileau was present and specifically stated his complete accord with the agreement reached by counsel.[6] As a result, two judgments were entered. The first judgment set forth amounts owed by each defendant, enjoined all defendants from transferring any assets or property, adjudged that Bethlehem had an equitable lien therein in an amount equal to the amount of the judgments entered against them and that the defendants held those assets and property in constructive trust for the benefit of Bethlehem, and finally, the Court retained jurisdiction in connection with any matters relating to the implementation of the order.

The second judgment entered that day was impounded by the Court at the request of counsel and remained so until all impounded matters were opened by order of Court on August 10, 1978. This second order directed that Henry L. Boileau, Leona P. Boileau and Pennsylvania Thoroughbred Horse Sales Co. take all steps necessary to convey to Bethlehem all of their right, title and interest in any and all real property they owned. Once again the Court retained jurisdiction over all matters relating to the implementation of the order. On June 26, 1972, the Court ordered that the three actions be consolidated into a single action under the equity case docket number and that the judgments which had been entered of record in each action remain and continue as judgments in the consolidated action.

By order dated July 21, 1972, the Court directed, pursuant to its authority under 21 P.S. §53,[7] that Charles L. Worthington, Prothonotary, convey to Bethle-

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6. Notes of hearing before Hon. William Hart Rufe, III, on June 21, 1972, p. 12 (Bucks County C.P.).

7. Act of April 19, 1901, P.L. 83, §1, 21 P.S. §53, which provides that where a party has previously been ordered by a court to transfer certain property and refuses, neglects or is unable to do so, the court may direct the conveyance to be made by the sheriff, prothonotary, clerk or trustee specially appointed for the purpose.

hem Steel Corporation all of the real property interests of Henry L. Boileau, Leona P. Boileau (whether held jointly or severally) and Pennsylvania Thoroughbred Horse Sales Co., Inc., which interests were set out in five exhibits to the order. The Court set August 14, 1972 as the date for a hearing concerning execution and acknowledgement of the exhibits to the order and provided that plaintiff notify Henry Boileau, Leona Boileau and the Pennsylvania Thoroughbred Horse Sales Co., Inc., thereof.

At the August 14 hearing, Attorney O'Hare expressed the willingness of Henry Boileau to execute all of the required papers, but stated further that when he explained to her the terms of the agreements already entered as judgments, Mrs. Boileau questioned his authority to act for her. However, she did not request that O'Hare withdraw his appearance on her behalf, nor did she have any other attorney represent her at the hearing, of which she had notice.[8] The Court accordingly entered an order directing Henry Boileau to execute the five exhibits attached to the order of June 21, 1972, and that Charles A. Jones, Sheriff of Bucks County, execute those documents on behalf of Leona P. Boileau. The documents were admittedly executed as ordered.

It is to this record that defendant Leona Boileau addresses her petition to strike the judgments. Judgments entered by the consent of the parties, like those at bar, are governed by the general rule enunciated by the Pennsylvania Supreme Court in *Zampetti v. Cavanaugh*, 406 Pa. 259, 265, 176 A. 2d 906, 909 (1962):

> "Although a consent decree is not a legal determination by the court of the matters in controversy, *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 405 Pa. 259, 265, 175 A. 2d 58 (1961), it

8. See, generally, Notes of Hearing before Hon. William Hart Rufe, III, on August 14, 1972 (Bucks County C.P.).

> binds the parties with the same force and effect as if a final decree has been rendered after a full hearing upon the merits. *Baran, et al. v. Baran, et al.*, 166 Pa. Super. 532, 537, 72 A. 2d 623 (1950). The fact that without the consent of the parties the court might not have rendered the judgment does not affect its effect as res judicata. Annot. 2 A.L.R. 2d 514, 528 (1948). Were this not so, a consent decree would have little value."

With this rule as background, we now examine Mrs. Boileau's challenges which are addressed both to the face of the record and beyond it. As to the face of the record, Mrs. Boileau first admits that the actions were commenced by praecipes for writs of summons, but then argues that she was never served with a complaint and received no notice of the proposed entry of judgments against her. According to the Sheriff's return, the writ of summons in equity was served personally on Leona Boileau on January 31, 1972. Subsequently, Attorney Bernard V. O'Hare, Jr., entered an appearance on her behalf. Thus authorized, Attorney O'Hare negotiated a settlement agreement with Bethlehem on behalf of his clients. The agreement was submitted to and accepted by the Court and judgments were entered based thereon. Certain documents were later executed on her behalf, by order of Court, pursuant to statutory authority.

Of those documents executed to affectuate the order and the underlying judgment, part of a deed (Tract No. 1 of Exhibit "A") and its supporting transfer tax affidavit of value (Exhibit "D") effected a transfer of a tract of land solely within the boundaries of neighboring Northampton County. The petitioner argues that in entering the underlying judgments the Court exceeded its "territorial jurisdiction", as set out in 12 P.S. §101.[9] That

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9. Act of June 13, 1836, P.L. 568, §79, 12 P.S. §101.

statute, in setting forth where real actions may be brought, is permissive in nature, stating that suits involving pleas of land "may be commenced" in any Court of the county where the land is situated. In *Bookwalter v. Stewart*, 369 Pa. 108, 85 A. 2d 100 (1952), the Pennsylvania Supreme Court confirmed this interpretation when it stated that, with certain exceptions ". . . all actions are now transitory . . . ," and that statutes which provide otherwise are merely "additional privileges"[10] to the rights provided in the Pennsylvania Rules of Civil Procedure. The applicable procedural rule concerning venue in equity, Pa. R.C.P. 1503, allows an action to be brought in any country in which:

> "(1) the defendant or a principal defendant may be served, or
> (2) the property or a part of the property which is the subject matter of the action is located, . . ."

By initiating this action in Bucks County, plaintiff has brought suit where defendant Leona Boileau could be and was, in fact, personally served and also where part of the property — three of the four subject tracts of land — is located. Plaintiff has, therefore, more than satisfied the requirements of the procedural rule and petitioner's objection to the face of the judgment as violative of venue or "territorial jurisdiction" must be dismissed.

Leona Boileau's remaining challenges: that she was never served with a complaint; that she never received notice of the proposed entry of judgments; that no evidence was presented to support the allegations of the complaint; that there exists no factual or legal basis for the judgments and that Mrs. Boileau never consented to entry of the judgments; would require the Court to go beyond the face of the record. As a result, these challenges are inappropriately brought by a petition to strike

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10. *Bookwalter, supra,* 369 Pa. at 111, 85 A. 2d at 101, which specifically includes the Act of June 13, 1836, P.L. 568, §79, 12 P.S. §101 as an "additional privilege."

the judgments. *Linnett v. Linnett*, 434 Pa. 441, 445, 254 A. 2d 7, 9 (1969); *Master Homecraft Co. v. Zimmerman*, 208 Pa. Superior Ct. 401, 404, 222 A. 2d 440, 442-443 (1966). Matters outside the record can only be considered by means of a petition to open judgment. *Master Homecraft Co., supra.*

Where a party claims that a judgment, for reasons not appearing of record, should not have been entered, the proper remedy is not a motion to strike, but a motion to open the judgment. *In re Estate of McCauley*, 478 Pa. 83, 385 A. 2d 1324 (1978); *Malakoff v. Zambar, Inc.*, 446 Pa. 503, 288 A. 2d 819 (1972). While it is generally held that a court may not convert a petition to strike into a petition to open, if the latter would be proper, *Hatgimisios v. Dare's N.E. Mint, Inc.*, 251 Pa. Superior Ct. 277 n. 3, 380 A. 2d 485, 486 n. 3 (1977); *Kros v. Bacall*, 386 Pa. 360, 365, 126 A. 2d 421, 424 (1956), "there is some authority for the proposition that a court may in a proper case treat a motion to strike as though it were a motion to open (citations omitted)." *In re Estate of McCauley, supra*, 478 Pa. at 88, 385 A. 2d at 1326. Assuming *arguendo*, that this is such a proper case, Mrs. Boileau's claim must fail. For a court to open a judgment, it must find that the petitioner has met the familiar three part test: (1) the petition is promptly filed; (2) the failure to proceed can be satisfactorily excused or explained; (3) a meritorious defense must be averred. *Balk v. Ford Motor Company*, 446 Pa. 137, 285 A.2d 128 (1971).[11] Here, the first element of the test would be determinative. The petition in the instant case was filed on June 20, 1978, one day shy of the sixth anniversary of the entry of the judgments. This is much too late to be

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11. As the three actions were consolidated under the equity case docket number, the above quoted standard is appropriate rather than the two part test in a trespass action. See *MacClain v. Penn Fruit*, 241 Pa. Superior Ct. 303, 305 n. 2, 361 A. 2d 403, 404 n. 2 (1976).

considered prompt. A petition to open would, therefore, necessarily fail.

Leona Boileau's next argument is that the subject judgments were entered against her in violation of Pennsylvania Rules of Civil Procedure 1517 through 1521, which provide the procedure that a Court is to follow at the conclusion of a trial in an equity matter. Those rules are not applicable here because ". . . settlement of a case by agreement, after petition, hearing, and the entry of a consent decree, renders an adjudication unnecessary." 2 Goodrich-Amram 2d §1517:1 at 171. The cases cited by petitioner ordering compliance with Pa. R.C.P. 1517 through 1521 are inappropriate as they deal with the situation where, after a full hearing on the merits of the underlying issues, a trial court refuses or neglects to comply therewith.[12]

Another argument raised by Mrs. Boileau is that she qualifies under an exception to the general rule that the Court may not look beyond the face of the record when considering a petition to strike. The exception applies where the authority of counsel to act for a party is at issue and, she argues, would allow the Court to consider certain affidavits and deposition testimony and, as a result, determine the judgments herein to be invalid. Mrs. Boileau contends that as Attorney O'Hare's authority to enter judgment against her by consent is at issue here, the Court must consider facts bearing on authority. While certain seldom used exceptions to the general rule do, in fact, exist, the petitioner does not fit within them. The cases wherein a Court has allowed a party to supply evidence of facts rendering a judgment void for lack of authority most often occur in the confession of judg-

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12. As we are unable to discern the factual setting in *Atlas Financing Corporation v. Investors Acceptance Corporation*, 445 Pa. 639, 312 A. 2d 401 (1973), from the Supreme Court's per curiam opinion and are unable to locate a record of the trial court's proceedings before appeal or after remand, we cannot determine the applicability, if any, of that authority.

ment setting. As many Courts consider judgment by confession to be a harsh remedy, they have allowed facts outside the record, including those concerning authority of the attorney entering a confessed judgment to appear of record in order to validate the procedure invoked by plaintiff. See, e.g., *Mullen v. Slupe*, 360 Pa. 485, 62 A. 2d 14, 16 (1948); *Bryn Mawr National Bank v. James*, 152 Pa. 363, 25 A. 823 (1893); *A. B. & F. Contracting Corp. v. Matthews Coal Co., Inc.*, 194 Pa. Superior Ct. 271, 166 A. 2d 317 (1960). The policy of closely scrutinizing the validity of confessed judgments because of the greater possibilities of abuse thereof is not applicable to the case at bar.

A second exception allows a Court to supplement the record with agreed upon facts or with facts conclusively established by depositions or other evidence. 7 Standard Pennsylvania Practice §165 at 194 (1961). While petitioner contends that Attorney O'Hare's lack of authority is a given fact, Bethlehem has at every turn contested that position and, consequently, there are no agreed upon facts to supplement the record. In addition, if this exception applied and the Court were allowed to look beyond the face of the record, the deposition testimony in support of petitioner's assertion does not "conclusively establish" that Attorney O'Hare was unauthorized. On the contrary, that testimony likewise supports Bethlehem's argument that O'Hare was in fact authorized to act for Mrs. Boileau. Consequently, the second exception is unavailing as well.

Mrs. Boileau argues that *Saupp v. Streit*, 258 Pa. 211, 101 A. 939 (1917) is controlling authority which entitles her to have the judgments stricken. Such is not the case. In *Saupp, supra*, plaintiffs sued Carolyne Streit Rothert both individually and as Executrix of the Estate of George F. Streit, deceased, on a cause of action grounded in the partnership dealings of the late Mr. Streit and plaintiff's decedent. The complaint set forth no allegations against Carolyne Rothert individually.

After negotiations between counsel and determination of a collateral issue by the Court, a settlement agreement was reached and judgment based thereon was entered by the Court "against the defendants." Four years later, Mrs. Rothert petitioned to strike the judgment insofar as it was entered against her individually. The Court granted the relief requested, noting that there was nothing in plaintiff's complaint alleging Mrs. Rothert's individual liability. *Saupp, supra,* 258 Pa. at 215, 101 A. at 940. Far from being compelling authority favoring petitioner's assertions, *Saupp* is but another case applying the general rule that where a defect appears on the face of the record, the judgment may be stricken.[13] We note further that in the instant case there are sufficient allegations in plaintiff's amended equity complaint to hold Mrs. Boileau liable in her individual capacity.

The final challenge, raised for the first time in petitioner's memorandum of law, is addressed only to the previously impounded judgment. Petitioner contends that that judgment is invalid as it results in the transfer of land in violation of the Statute of Frauds, 33 P.S. §1[14]

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13. Petitioner also cites *Bryn Mawr National Bank v. James, supra,* for the proposition that a judgment entered wholly without authority is outside of the general rule and may be stricken. As noted above, this case fits within the confessed judgment exception. Another of petitioner's authorities, *Associates Discount Corporation v. Goldman,* 524 F. 2d 1051 (1975), is distinguishable in that the proceedings there were brought under Federal Rule of Civil Procedure 60(b), which allows a Court to relieve a party from a final judgment in certain circumstances.

14. Act of March 21, 1772, 1 Sm. L. 389, §1, 33 P.S. §1, provides inter alia: "all . . . interests of freehold . . . made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect . . . estates at will only, . . .; and moreover, that no . . . estates or interests . . . of freehold . . . shall at any time . . . be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the part so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, . . ."

and cites *Gogel v. Blazofsky*, 187 Pa. Superior Ct. 32, 142 A. 2d 313 (1958), as support for her contention. In *Gogel*, supra, an agreement to settle an underlying ejectment action required the payment of money in return for the conveyance of certain real estate. The agreement and authority to enter into it was entirely oral and the Superior Court reversed the trial court's Order directing specific performance of the settlement agreements. In the instant case, however, a written agreement evidencing the transfer of land does exist. It was negotiated by Mrs. Boileau's duly authorized agent whose authority is written and appears of record. The deed of transfer was executed by an officer of the Court on August 14, 1972 pursuant to statutory authority[15] and this Court's Orders of July 21, 1972 and August 14, 1972. The statute provides that such execution is "the same as if it had been duly executed and delivered by the party personally."[16] Therefore, the record contains no error justifying relief based on the Statute of Frauds. As a result, Mrs. Boileau's petition must fail as to the entirety of the judgments and must be dismissed.

Having discussed the authorities and contentions of the parties herein, we enter the following:

ORDER

AND NOW, this 6th day of June, 1979, defendant Leona P. Boileau's petition to strike this Court's judgments of June 21, 1972, is hereby denied and dismissed.

BY THE COURT,

WILLIAM HART RUFE, III

J.

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15. Act of April 19, 1901, P.L. 83, §1, 21 P.S. §53.
16. Id.

BETHLEHEM STEEL CORPORATION,
v.
TRI STATE INDUSTRIES, INC., et al.
Appeal of Leona P. BOILEAU.
Superior Court of Pennsylvania.
October Term, 1979,
No. 1265
Argued Dec. 5, 1979.
Filed June 12, 1981.
Reargument Denied Oct. 13, 1981.
Petition for Allowance of Appeal Denied
Nov. 30, 1981.

Cletus P. Lyman, Philadelphia, for appellant.
John G. Harkins, Jr., Doylestown, for appellees.
Before SPAETH, CAVANAUGH and O'KICKI,* JJ.
CAVANAUGH, JUDGE:

Appellant Leona P. Boileau appeals the lower court's order dimissing her petition to strike a consent judgment and dismissing her preliminary objections. She argues that her petition to strike the consent judgment entered against her should have been granted for three reasons: that the judgment was entered without her authority; that the transfer of real estate pursuant to the judgment violates the statute of frauds; and that the complaint does not set forth a cause of action against her. She also contends that her preliminary objections to the amended complaint should have been sustained. We affirm.

In January, 1972 the plaintiff began actions in trespass, assumpsit, and equity against various defendants. Appellant's husband was a defendant in all three actions and the appellant was a defendant in the equity action. The complaints alleged that appellant's husband had embezzled funds from the plaintiff during the course of his employment. Appellant's husband hired an attorney

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* Joseph F. O'Kicki, President Judge of the Court of Common Pleas of Cambria County, Pennsylvania, is sitting by designation.

to represent him in these matters. The attorney entered his appearance on behalf of both the appellant and her husband in the equity action. Around the time these lawsuits were begun the appellant was separating from her husband and was residing in another state. Settlement discussions were held between the plaintiff and the attorney who had entered his appearance for the appellant and her husband. As a result of these discussions in June 1972 two judgments were entered against the appellant and her husband. One judgment awarded damages in favor of the plaintiff and against various defendants jointly and severally, enjoined the defendants from transferring their property to anyone other than plaintiff, adjudged that defendant's property was equitably owned by the plaintiff, that plaintiff had an equitable lien thereon, and that the defendants held the property in a constructive trust for the benefit of the plaintiffs. The other judgment directed the appellant and her husband to convey their interest in all their real property to the plaintiff.

Appellant did not participate in the discussions which resulted in these judgments. However, within weeks after the consent judgments were entered, she was informed of the entry of judgment. At that time she objected to them and told her husband and Mr. O'Hare, the lawyer who had entered his appearance for her, that her husband and Mr. O'Hare did not represent her.

In July, 1972 Mr. O'Hare informed the plaintiff that appellant was unwilling to execute deeds as required by the judgments. Later in July, 1972 the court held a hearing at which the court designated the prothonotary to execute the deeds on appellant's behalf pursuant to statute.

In August, 1972 another hearing was held in which Mr. O'Hare informed the court and plaintiff that appellant had objected to the judgment and had stated that he did not represent her. Mr. O'Hare also stated that appellant knew the hearing was scheduled that day and knew the purpose of the hearing was to have the prothonotary

execute documents on appellant's behalf. Appellant denies any such knowledge of the hearing. At the hearing the documents which appellant was supposed to execute were executed by the sheriff as ordered by the court.[1]

Nearly six years later, in June, 1978, appellant filed the instant petition to strike off the judgment and later filed preliminary objections. The lower court dismissed the petition to strike and dismissed the preliminary objections and this appeal followed.

Since Pa.R.Civ.P. 1019(b) requires that fraud be alleged with particularity, appellant argues that the consent judgment should be stricken because the amended complaint filed against her did not sufficiently specify the fraudulent acts in which she was alleged to have conspired. For this argument appellant relies on paragraph 4(c) of the amended complaint. Appellant's brief 39. This argument ignores other parts of the complaint such as paragraph 4 and 4(a) which allege specific acts of fraud. R.R. 70a. Thus we agree with the lower court that the amended complaint is sufficiently specific. Lower court opinion 13.

Appellant also argues that the consent judgment should be stricken because of a violation of the statute of frauds. She contends that since consent judgments are like contracts, see discussion *infra*, and since the instant consent judgment, inter alia, directed her to convey real property to the plaintiff, the statute of frauds, 33 P.S. §1, is applicable. Moreover since there is no writing signed by her or by her agent whose authority is in writing agreeing to the transfer of the realty, she asserts that the statute of frauds is violated and the judgment must be stricken. We assume without deciding that the statute of frauds applies to the instant case. Nevertheless the peti-

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1. Since the Prothonotary was unavailable, the court designated the sheriff to execute the deeds.

tion to strike the judgment was properly dismissed since it was not filed within a reasonable time after the judgment was entered.

In Pennsylvania some statutes of frauds make oral agreements in violation thereof void or unenforceable while other statutes of frauds merely constitute declarations of public policy. *Brown v. Hahn*, 419 Pa. 42, 213 A.2d 342 (1965). Those statutes of frauds which make oral agreements void or unenforceable can be raised by a demurrer in preliminary objections, *Blumer v. Dorfman*, 447 Pa. 131, 289 A.2d 463 (1972) (promise to answer for the debt of another); Pa.R.C.P. 1017(b)(4), and can even be raised in a motion for judgment on the pleadings, *Leonard v. Martling*, 378 Pa. 339, 106 A.2d 585 (1954) (same). They constitute limitations on the power of the judiciary to afford a remedy. *Brown v. Hahn*, *supra* at 49-50, 213 A.2d at 345-46. In contrast, those statutes of frauds which merely constitute declarations of public policy can be waived by failing to raise the issue in new matter in a responsive pleading. *Id.; see* Pa.R.C.P. 1030, 1032; 2 Goodrich-Amram 2d §1032:3. The statute of frauds relating to interests in land, 33 P.S. §1, is the type which is waivable and constitutes a declaration of public policy. *Id.* The statute of frauds relating to interests in land is, therefore, not the type of statute which renders oral agreements void.

Since the statute of frauds relating to land does not render oral agreements void, the instant consent judgment is not void, if, as we assume without deciding, the statute of frauds applies. Because violation of the statute of frauds instantly does not make the judgment void and such a defect is not jurisdictional, a motion to strike must be filed within a reasonable time or the defect will be considered waived. *King Athletic Sporting Goods Co. v. Redevelopment Authority*, 481 Pa. 504, 393 A.2d 18 (1978). There the Supreme Court said:

> "The general rule is that if a judgment is sought to be stricken off for an irregularity, not jurisdictional in nature, which merely renders the judgment voidable, the application to strike off must be made within a reasonable time, or the irregularity will be held to be waived."
>
> 7 Standard Pennsylvania Practice Ch. 30, §196 (1961). Accord *Samango v. Hobbs*, 167 Pa.Super. 399, 75 A.2d 17 (1950), quoting *Eastman Kodak Co. v. Osenider*, 127 Pa.Super. 332, 193 A. 284 (1937).

Id. at 508, 393 A.2d at 20.

Instantly the petition to strike was filed nearly six years after the judgment had been entered, and nearly six years after the appellant knew judgment had been entered.[2] Hence her claim that the judgment should be stricken for violation of the statute of frauds was asserted too late.[3]

The third argument appellant asserts is that the judgment should be stricken since it was entered without her authority.

In *Pa. Human Relations Commission v. Ammon K. Graybill, Jr., Inc.*, 482 Pa. 143, 393 A.2d 420 (1978) our Supreme Court discussed the nature of consent decrees:

> Although a consent decree does not represent a legal determination by a court or administrative tribunal of the matters in controversy, *Universal Builders Supply, Inc. v. Shaler Highlands Corporation*, 405 Pa. 259, 265, 175 A.2d 58, 61 (1961), it nevertheless has important consequences. A con-

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2. Appellant admits in her affidavit that within weeks of their entry she knew the consent judgment had been entered against her. R.R. 154a.

3. The lower court held that if appellant's petition to strike were considered as a petition to open, it would fail since it was not filed within a reasonable time.

sent decree has a *res judicata* effect, binding the parties with the same force and effect as a final decree rendered after a full hearing upon the merits. *International Organization Masters, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates and Pilots of America, Inc.*, 456 Pa. 436, 440, 318 A.2d 918, 921; *Zampetti v. Cavenaugh*, 406 Pa. 259, 265-66, 170 A.2d 906, 909. *See* Annotation, "Res judicata as affected by fact that former judgment was entered by agreement or consent," 2 A.L.R.2d 514, 528 (1948). In the absence of fraud, accident or mistake, a court has neither the power nor the authority to modify or vary the terms of a consent decree. *Universal Builders Supply, Inc., supra* 405 Pa. at 265, 175 A.2d at 61; accord, *Jones Memorial Baptist Church v. Brackeen*, 416 Pa. 599, 603, 207 A.2d 861, 863 (1965), 27 Am.Jur.2d, Equity, §246 (1966). Nor is such a decree subject to a collateral attack. *International Organization Masters, Mates and Pilots of America, Inc., supra*, 456 Pa. at 441, 318 A.2d at 921, citing *Baran v. Baran*, 166 Pa.Super. 532, 537, 72 A.2d 623, 625 (1950).

Given the conclusive nature of a consent decree, it is imperative that each party to it has willingly and freely assented to its terms. Like any contract, a consent decree requires mutuality of understanding and concerted action by the parties. *Universal Builders Supply, Inc., supra*, 405 Pa. at 265, 175 A.2d at 61. As this Court observed in *Id.* at 147-48, 393 A.2d at 422-23.

Moreover, in *Senyshyn v. Karlak*, 450 Pa. 535, 299 A.2d 294 (1973), the court held that an attorney has no authority to enter into a consent decree without the client's knowledge or consent; the court observed that "[t]he very nature of a consent decree requires understanding of or ratification by the respective parties." *Id.* at 539, 541, 299 A.2d at 296, 297.

Appellant argues that Attorney O'Hare did not have authority to enter a consent judgment against her. The method by which appellant has raised this issue is significant. Appellant has raised this issue through her petition to strike the judgment; appellant has not filed a petition to open the judgment.

We have recently stated the differences between a petition to strike a judgment and a petition to open a judgment:

> [1] A petition to strike a judgment is a common law proceeding, *Hamborsky v. Magyar Presbyterian Church*, 78 Pa.Super. 519, 522 (1922), and operates as a demurrer to the record, *Advance Building Services Co. v. F. & M. Schaefer Brewing Co.*, 252 Pa.Super. 579, 582 n.3, 384 A.2d 931, 932 n.3 (1973), *citing, Master Homecraft Co. v. Zimmerman*, 208 Pa.Super. 401, 222 A.2d 440 (1966). Thus, a petition to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. Matters dehors the record will not be considered, and if the record is self-sustaining, the judgment will not be stricken. *Cameron v. Great Atlantic and Pacific Tea Co.*, 439 Pa. 374, 266 A.2d 715 (1970); *Linett v. Linett*, 434 Pa. 441, 254 A.2d 7 (1969); *Liquid Carbonic Corp. v. Cooper & Reese, Inc.*, 272 Pa.Super. 462, 416 A.2d 549 (1979); *Advance Bldg. Services Co. v. F. & M. Schaefer Brewing Co., supra; Metropolitan Federal Savings & Loan Ass'n. of Eastern Pennsylvania v. Bailey*, 244 Pa.Super. 452, 368 A.2d 808 (1976); *Policino v. Ehrlich*, 236 Pa.Super. 19, 345 A.2d 224 (1975).
>
> A petition to open a judgment is an appeal to the court's equitable powers and is a matter for judicial discretion. *McCoy v. Public Acceptance Corp.*, 451 Pa. 495, 305 A.2d 698 (1973); *Hamborsky v. Magyar Presbyterian Church, supra*. In consider-

> ing a petition to open a judgment, the court may consider matters dehors the record. *See Matlock v. Lipare*, 243 Pa.Super. 167, 170-71, 364 A.2d 503, 504 (1976). Ordinarily, a petition to open a judgment will not be granted unless three factors coalesce: "(1) the petition to open must be promptly filed; (2) the failure to appear or file a timely answer must be excused; and (3) the party seeking to open the judgment must show a meritorious defense." *McCoy v. Public Acceptance Corp., supra* 451 Pa. at 408, 305 A.2d at 700; *Balk v. Ford Motor Co.*, 446 Pa. 137, 285 A.2d 128 (1971); *Liquid Carbonic Corp. v. Cooper & Reese, Inc., supra; Shainline v. Alberti Builders, Inc.*, 266 Pa.Supra . 129, 403 A.2d 577 (1979); *Queen City Electrical Supply Co., Inc. v. Soltis Elec. Co., Inc.*, 258 Pa.Super. 305, 392 A.2d 806 (1978); *Day v. Wilkie Buick Co.*, 239 Pa.Super. 71, 361 A.2d 823 (1976).

Kophazy v. Kophazy, 279 Pa.Super. 373, 421 A.2d 246, 247 (1980) (footnote omitted).

Appellant instituted proceedings to challenge the judgment nearly six years after it was entered.

Since a petition to open judgment must be promptly filed, *Kophazy, supra*, appellant has proceeded solely by way of a petition to strike the judgment. However, since a court in ruling on a petition to strike will not consider matters dehors the record, *Kophazy, supra*, appellant argues (1) that the attorney's authority to enter a consent judgment must appear on the record or (2) that evidence of lack of an attorney's authority may be considered even though it is dehors the record.[4]

We assume arguendo that an attorney's authority to have a consent judgment entered against his client must appear on the record, see *International Organization*

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4. For this latter proposition appellant relies on *Mullen v. Slupe*, 360 Pa. 485, 62 A.2d 14 (1948) and *Bryn Mawr National Bank v. James*. 152 Pa. 364, 25 A. 823 (1893).

Masters, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates and Pilots of America, Inc., 456 Pa. 436, 441, 318 A.2d 918 (1974); *Senyshyn v. Karlak*, 450 Pa. 535, 539, 541, 299 A.2d 294 (1973); *Springer v. Springer*, 255 Pa.Super. 35, 386 A.2d 122, 124 (1978), and that therefore appellant's claim is cognizable through a petition to strike. Nevertheless, we must consider whether a court should grant such a petition to strike which is filed nearly six years after the petitioner knew of the entry of the consent judgment.

As we have previously discussed in our analysis of appellant's statute of frauds argument, if an alleged defect is not jurisdictional in nature and merely renders the judgment voidable the application to strike must be made within a reasonable time. *King Athletic Sporting Goods Co. v. Redevelopment Authority*, 481 Pa. 504, 393 A.2d 18, 20 (1978). Here the lower court had jurisdiction of the subject matter and had jurisdiction over the parties. Hence the judgment is not void for lack of jurisdiction. In determining whether the judgment is otherwise void we consider the nature of the defect.

The leading case on the subject of an attorney's authority to enter into a consent decree is *Senyshyn v. Karlak*, 450 Pa. 535, 299 A.2d 294 (1973). In *Senyshyn v. Karlak*, the defendants directly appealed from the entry of a consent decree. They asserted that their attorney had no authority to enter into a consent decree. The court stated that the question of authority was one of agency. *Id.* at 539, 299 A.2d at 296. It held that an attorney has no authority to enter into a consent decree without the client's knowledge or consent. *Id.* at 539, 299 A.2d at 296. Moreover, the court characterized a consent judgment entered without the client's knowledge or consent as one which "will not be binding" and that has "no binding force." *Id.* at 539, 542, 299 A.2d at 296, 298. Furthermore, the court indicated that the consent de-

cree could be ratified by the parties. *Id.* at 541, 299 A.2d at 296-297. Thus the court did not state whether a consent judgment entered without the client's knowledge or consent is void or voidable.

However, *Senyshyn v. Karlak* did state that the question of an attorney's authority to enter into a consent decree is a question of agency. We are therefore guided by those cases which involve the question of a partner's authority to execute a warrant of attorney to confess judgment which is binding on the partnership since those cases also involve a question of agency.

In *Sterle v. Galiardi Coal and Coke Co.*, 168 Pa.Super. 254, 77 A.2d 669 (1951), the defendant appealed from the lower court's order refusing to strike a confessed judgment. The defendant argued, inter alia, that the judgment was improperly confessed against the partnership since the warrant of attorney was signed by only one partner and there was no averment that the one partner had authority to execute the warrant of attorney and confess judgment against the partnership. The court acknowledged that one partner could not execute a warrant of attorney to confess judgment against the partnership unless authorized by the partners or subsequently ratified by them. However, it also stated that such a confessed judgment was voidable, not void. *Id.* at 259, 77 A.2d 673; *see Jamestown Banking Co. v. Conneaut L. D. & D. Co..*, 339 Pa. 26, 14 A.2d 325, 327 (1940); *cf. Prestressed Structures, Inc. v. Bargain City, U. S. A., Inc.*, 413 Pa. 262, 196 A.2d 338, 341 (1964) (attack on agent's authority to confess judgment must be through petition to open). Since a confessed judgment entered against a partnership on a warrant of attorney signed by only one partner is voidable even though one partner alone cannot bind the partnership, *Stearle, supra,* we hold that a consent judgment entered into by

an attorney is also voidable even though the attorney alone cannot bind a party.[5]

Bryn Mawr National Bank v. James, 152 Pa. 364, 25 A. 823 (1893), which appellant cites, is not contrary to our holding that the consent judgment is voidable. In *Bryn Mawr National Bank* judgment was entered against the defendant for failure to file an affidavit of defense. When execution was attempted, the defendant moved to strike the judgment on the grounds that the attorney who had accepted service of the writ and statement was not her attorney, the attorney had never been consulted with respect to the suit and had no authority from the defendant to accept service of the writ and statement. The lower court found that the attorney had no authority and struck the judgment. The Supreme Court affirmed indicating that a judgment entered without authority is no judgment at all. Nowhere in the opinion does the court state that the judgment is void. Moreover the time between the entry of judgment and the rule to strike was less than five months.[6] *Cf. Lytle v. Hoover*, 175 Pa. 408, 34 A. 734 (1896) (application to open a default judgment on ground that attorney had no authority to accept service of a summons was denied be-

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5. The judgments in the instant case, inter alia, involve title to real estate which was owned by appellant and her husband as tenants by the entireties. Neither party has raised the issue that the husband was acting as the wife's agent. *See generally Kennedy v. Erkman*, 389 Pa. 651, 658, 133 A.2d 550, 553 (1957); *Ripple v. Pittsburgh Outdoor Advertising Corp.*, 280 Pa.Super. 121, 421 A.2d. 435 (1980); *John M. Rouse, Inc. v. Logan*, 268 Pa.Super. 376, 408 A.2d 514 (1979); *Roman Mosaic and Tile Co., Inc. v. Vollrath*, 226 Pa.Super. 215, 313 A.2d 305 (1973).

6. We conclude this from the paragraph preceding the court's opinion. There the reporter states that the record showed that service of the writ and statement was accepted on November 2, 1891 and on March 10, 1892 the rule to strike off the judgment was made absolute. *Bryn Mawr National Bank*, supra, at 365, 25 A. at 823.

cause of laches). Thus, *Bryn Mawr National Bank* does not require us to reach a different result.[7]

Moreover, we are not persuaded to extend the statement in *Centennial Bank v. Germantown-Stevens Academy*, 277 Pa.Super. 134, 419 A.2d 698 (1980), to consent judgments. In *Centennial Bank* we stated that a judgment confessed against a party who has not authorized it is void. *Id.* at 139, 419 A.2d at 700. However, because warrants of attorney to confess judgment are subject to a particular scrutiny which is not applicable to consent judgments, we decline to extend such a statement to consent judgments. For example in *Solebury National Bank of New Hope v. Cairns*, 252 Pa.Super. 45, 380 A.2d 1273 (1977) we said:

> If any doubt exists as to the propriety or effect of a warrant of attorney authorizing confession of judgment, the doubt must be resolved against the party in whose favor the warrant is given. *See A. B. & F. Contracting Corp. v. Matthews Coal Co.*, 194 Pa.Super. 271, 166 A.2d 317 (1960). Our Court has recognized that this rule of strict construction may be constitutionally mandated in light of recent due process attacks on cognovit clauses. *See Egyptian Sands Real Estate, Inc. v. Polony*, 222 Pa.Super. 315, 294 A.2d 799 (1972); *Citizens National Bank of Evans City v. Rose Hill Cemetery Assoc. of Butler*, 218 Pa.Super. 366, 281 A.2d 73 (1971). *Cf. Swarb v. Lennox*, 314 F.Supp. 1091 (E.D.Pa.1970), aff'd, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972).

Id. at 48, 380 A.2d at 1275.

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7. *Saupp v. Streit*, 258 Pa. 211, 101 A. 939 (1913), also cited by appellant does not mandate a different result. *Saupp*, which involved a consent judgment, has different facts from the instant case and there is no statement that the judgment there was void.

Finally we note that the drafters of the Restatement (Second) of Judgments, in the Introductory Note to Chapter 2, "Validity of Judgments", Restatement (Second) of Judgments (Tent.Draft. No. 5, March 10, 1978), express the view that if a judgment is not valid, it may be avoided not as an automatic consequence, but depending on the nature of the defect, the opportunity of the complaining party to challenge the defect, and on whether there has been reliance on the judgment. *Id.* at 4-5. Judge Spaeth, in a concurring opinion joined by President Judge Cercone and Judge Price, has advocated the adoption of this view of the tentative draft of the Restatement (Second) of Judgments. *Tice v. Nationwide Life Insurance Co.*, 11 Pa.Super. 220, ——, 425 A.2d 782, 787 (1981). Moreover, the concurring opinion in *Tice, supra,* also questions the view, expressed in cases such as *Haverford Township School District v. Herzog,* 314 Pa. 161, 171 A. 455 (1934), and *Romberger v. Romberger,* 290 Pa. 454, 139 A. 159 (1927), that laches does not run against a void judgment. *Tice, supra,* at ——, 425 A.2d at 791-792.

Under the analysis of the tentative draft of the Restatement (Second) of Judgments the instant consent judgment would not be stricken. The appellant had an opportunity to challenge the judgment for almost six years and in the intervening time at least some of the realty appears to have been transferred to third parties in reliance on the consent judgment.[8] In appellee's new matter to appellant's petition to strike the judgment the appellee alleged that appellant had notice of judicial sales of the realty and appellant did not deny the allegation in her replication to the new matter. R.R. 132a, 134a-36a. Thus it appears that despite the appellant's notice of judicial sales, she did not move to strike the judgment earlier. Therefore, if we employed the analysis

8. In the court below appellant moved to join as additional parties subsequent transferees of the realty.

espoused by the tentative draft of the Restatement (Second) of Judgments, the instant consent judgment would not be stricken even if the judgment were void.

The lower court did not err in dismissing the petition to strike. Moreover, since the petition to strike was properly dismissed, the judgment stands and appellant's preliminary objections to the amended complaint were also properly dismissed.

Order affirmed.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CARL RICE, ESQ.
PROTHONOTARY

468 CITY HALL
PHILADELPHIA 19107
(215) 496-4600

December 2, 1981

Richard A. Ash, Esq.
Lyman and Ash
1612 Latimer Street
Philadelphia, Pa. 19103

RE: Leona P. Boileau v.
Bethlehem Steel Corporation, et al.
No. 365 E. D. Misc. Docket 1981

Dear Mr. Ash:

This is to advise you that on November 30, 1981 the Supreme Court entered its Order denying the petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

_____

Carl Rice, Esq.
Prothonotary

CR: jap
cc: John G. Harkins, Jr., Esq.
Bernard V. O'Hare, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1251

BOILEAU, LEONA P.,

Appellant

v.

BETHLEHEM STEEL CORPORATION, BERNARD V. O'HARE, ESQUIRE, BLANK, ROME, KLAUS & COMISKY, JOANNE N. CASILIO, FERNANDO P. CASILIO and JOHN F. CASILIO, Co-partners Trading as FRANK CASILIO & SONS, JOHN CHILTON, DOROTHY LORRAINE CHILTON, HENRY R. BANDELIN, MERRILE F. BANDELIN, WILLARD H. RENNINGER, ALICE F. RENNINGER, STEPHEN G. DONCEVIC, MARY D. DONCEVIC, DONALD F. EISMANN, HELEN O. EISMANN, BENJAMIN C. QUEEN and NORMA L. QUEEN

(D.C. Civil No. 78-2078)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, BECKER and VAN DUSEN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 15, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 14, 1983, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings consistent with opinion of this Court.

ATTEST:

M. ELIZABETH FERGUSON

Chief Deputy
Clerk

March 28, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1251

LEONA P. BOILEAU,

Appellant

v.

BETHLEHEM STEEL CORPORATION, et al.
(C. A. No. 78-2078)

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL OR
REHEARING IN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and VAN DUSEN,* *Circuit Judges*.

The petition for panel rehearing or rehearing in banc filed by Appellees Bethlehem Steel Corporation and Blank, Rome, Comisky & McCauley in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for panel rehearing or rehearing in banc is denied.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

DATED: April 23, 1984

* As to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1251

LEONA P. BOILEAU,

Appellant

v.

BETHLEHEM STEEL CORPORATION, et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 30, 1984.

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: May 3, 1984

No. 1948

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

BETHLEHEM STEEL CORPORATION et al.,

Petitioners,

v.

LEONA P. BOILEAU et al.,

Respondents.

BRIEF OF RESPONDENT LEONA P. BOILEAU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Cletus P. Lyman
LYMAN & ASH
1612 Latimer Street
Philadelphia, PA 19103
(215) 732-7040

Attorneys for Respondent,
Leona P. Boileau

TABLE OF CITATIONS

Rules and Other Authorities

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Counterstatement of Questions Presented

1. Should this court redecide the law of Pennsylvania on the res judicata effect of denial of a petition to strike a judgment upon an independent action to enjoin enforcement of the judgment and for other relief?

2. Should this court apply Lugar v. Edmondson Oil Co. to this case in light of the court of appeals decision that the district court should consider the matter in the first instance?

3. Should this court grant a writ of certiorari to petitioners who are in default for failure to serve an answer when reversal of the court of appeals would require decision of a remaining issue which the court of appeals did not reach?

Statement of the Case

Petitioner Bethlehem Steel Corporation ("Bethlehem Steel") sued plaintiff-respondent, Leona P. Boileau, in the Court of Common Pleas of Bucks County, Pennsylvania, on January 18, 1972. Blank, Rome, Klaus & Comisky ("Blank, Rome") represented Bethlehem Steel.

Bethlehem Steel alleged that Mrs. Boileau conspired with her husband, Henry L. Boileau, a Bethlehem Steel manager, in embezzling funds from Bethlehem Steel through a fraudulent invoice scheme. Bethlehem Steel showed ambivalence toward including Mrs. Boileau. It named her as an afterthought, then dropped her from the litigation, and added her once again about one month before the litigation

ended.

Mrs. Boileau was a housewife, who raised two children, and was not employed by Bethlehem Steel. She separated from her husband at the outset of the litigation and moved to Rhode Island. She denies service of process upon her (a sheriff's return of service notwithstanding).

Mr. Boileau maintained that Bethlehem Steel authorized his activities, that money generated by the scheme was used for bribery by Bethlehem Steel, and that the action against him was a sham to divert scrutiny from Bethlehem Steel's guilt.

Mrs. Boileau was not represented in the proceedings, but on June 21, 1972, Bethlehem Steel, her husband and their attorneys purported to settle the case

by agreeing to $797,404 in damages and transfer of the property of the Boileaus to Bethlehem Steel. Her husband's attorney purported to act on her behalf also.

A state judge entered "consent" judgments on the say-so of the attorneys. When Mrs. Boileau learned what had happened, she refused to sign releases and deeds contemplated by the settling parties. The husband's lawyer told Bethlehem Steel and the state court judge of Mrs. Boileau's repudiation of the settlement and her disavowal of representation by her husband's lawyer no later than July 17, 1972.

Undetered by the lack of foundation for the judgments, Bethlehem Steel and the state judge transferred Mrs. Boileau's property to Bethlehem Steel on August 14, 1972. The judge ordered the

sheriff to sign deeds for Mrs. Boileau. Bethlehem Steel later sold it at auction. Mrs. Boileau denies receiving notice of the post-judgment execution proceeding (petitioners' assertions to the contrary, no one could be found who claimed to have given her notice).

Mrs. Boileau was unable for a number of years to find counsel to champion her cause.

On June 20, 1978, within the six year Pennsylvania general statute of limitations then in effect, Mrs. Boileau filed a diversity action in the United States District Court for the Eastern District of Pennsylvania, seeking an injunction against further enforcement of the judgments, restitution of her property and damages. Such action was authorized under Pennsylvania practice by Sherwood Bros. Co. v. Kennedy, 132

Pa. Super. 154, 200 A.689 (1938) and under federal diversity practice by Marshall v. Holmes, 141 US 589 (1891) and Huddleston v. Ohio River Co., 328 F.2d 789, 791 (3rd Cir. 1964). Bethlehem Steel and Blank, Rome moved to dismiss or to stay the diversity action.

On October 16, 1978, the district court denied the motion to dismiss but stayed proceedings on her case pending a petition to strike the judgments in Bucks County.

The petition to strike was summarily denied by the state judge on June 6, 1979, and his ruling was affirmed by the Superior Court of Pennsylvania on June 12, 1981. Bethlehem Steel v. Tri State Industries, Inc., 290 Pa. Super 461, 434 A.2d 1236 (1981). (A-54-67 (Appendix to Petition)). The Supreme Court of Pennsylvania denied further appeal on

November 30, 1981.

On July 24, 1980, Bethlehem Steel pleaded guilty to a lengthy history of corporate corrupt practices similar to those alleged by Mr. Boileau years before. United States v. Bethlehem Steel Corporation, S.D.N.Y. 80 Crim. 431.

Mrs. Boileau had no hearing in the state courts, and the Superior Court denied relief on the ground that her petition was not filed within a reasonable time.

Returning to the district court, Mrs. Boileau moved to amend her complaint to plead violation of 42 U.S.C., Section 1983, and to drop the grantees from Bethlehem Steel as defendants (thereby electing damages over return of her property). The law in the jurisdiction

changed when Dennis v. Sparks, 449 U.S. 24 (1980), overruled Meyer v. Curran, 397 F. Supp. 512 (E.D. Pa. 1975), permitting damages actions against private parties who join with state judges in violating civil rights.

On March 5, 1982, Bethlehem Steel and Blank, Rome moved for summary judgment, but they neglected to file an answer.

On March 14, 1983, the district court gave preclusive effect to the actions of the state courts of Pennsylvania in denying Mrs. Boileau's petition to strike judgments (A-30-34), and granted defendants summary judgment.

On March 28, 1984, the United States Court of Appeals for the Third Circuit reversed the district court, holding (1) that under Pennsylvania law, the denial of a petition to strike judgments was

not res judicata of an independent action to enjoin enforcement of judgments and for damages, and (2) that the district court abused its discretion in denying leave to amend the complaint to add Section 1983. Boileau v. Bethlehem Steel Corp., 730 F.2d 929 (3rd Cir. 1984) (A-1-14).

While the appeal was pending, plaintiff learned that Blank, Rome had contributed to the campaigns of at least four jurists in the state courts who sat on Mrs. Boileau's case, including one Pennsylvania Supreme Court Justice who was running for retention and sitting on the case at the time of the campaign contribution. Blank, Rome also contributed to the campaign of the Superior Court judge who wrote the last opinion in the case.

Mrs. Boileau filed a Rule 60(b) motion

in the district court on October 20, 1983, before the argument of her appeal. She asked the appellate court to take notice of the 60(b) motion in deliberating upon the effect to be given to the state court proceedings.

The court of appeals declined to rule on the judicial campaign contribution issue on the grounds that it was unnecessary to do so in light of Mrs. Boileau's success on the original issues in the appeal and because the issue arose pending appeal (A-16-18, A-23-24).

Argument

1. This court should not redecide the law of Pennsylvania on res judicata.

Petitioners intimate that the court of appeals deviated from established practice to provide a federal forum for fact finding with respect to issues of state law. This is erroneous. The court of appeals followed the principle that a federal court sitting in diversity must apply the law of the state in which it sits.

Three judges from Pennsylvania held that Bowman v. Berkey, 259 Pa. 327, 103 A.49 (1918), controlled and that under Pennsylvania law the denial of a petition to strike a judgment was not res judicata with respect to a subsequent action to enjoin enforcement and for damages.

Even if there were doubt on the question, it would be inappropriate for this court to devote its resources to redeciding a question of Pennsylvania law.

Bowman is consistant with other states and federal courts concerning relief from judgments. Compare Griffith v. Bank of New York, 147 F.2d 899 (2d Cir. 1945) and Rule 60(b), F.R. Civ. P.

The application of Bowman to the facts of this case is correct since the petition to strike was decided without regard to evidence outside the original record upon which the judgments were entered. Mrs. Boileau was unable to have considered her evidence that her husband's attorney did not represent her and that she was not served with process. She was bound by the attorney's unauthorized entry of

appearance and an erroneous sheriff's return.

Mrs. Boileau was denied consideration on a technicality relating to petitions to strike, which have no application to independent actions raising issues of fact outside the original record.

The Superior Court denied the petition to strike as untimely in part because of the effect on third parties such as grantees from Bethlehem Steel (A-66).

Standard Pennsylvania Practice, Chapter 30, Section 7, says:

> "The remedy afforded by the proceeding in equity to obtain relief from a judgment operates, not upon the judgment itself, but the parties only, and the decree in such suit operates in personam upon the judgment creditor, who may be punished for contempt of court consisting of violation of the decree. Equitable relief may be obtained in the proper case by means of an injunction. Courts of equitable jurisdiction may, under proper circumstances, as an

incident to relief against a judgment, compel reconveyance or grant an account."

Marshall v. Holmes, supra, 141 US at 599, described a diversity action of the present type:

> "While it (the federal court) cannot require the state court itself to set aside or vacate the judgments in question, it may, between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect will operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in the state court. It would simply take from him the benefit of judgments obtained by fraud."

2. This court should decline an invitation to apply Lugar v. Edmondson Oil Co. to this case in the absence of lower court determinations.

Petitioners ask the court to decide the application of Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), to this case. The district court did not decide

the question and the court of appeals expressly declined to preempt the district court on the proper application of Lugar because of lack of clarity of the record and the principle that the district court should decide issues in the first instance (A-19 (note 10)).

It would be inappropriate for this court to take up an issue before the district court or the court of appeals.

3. Petitioners' default and the remaining judicial campaign contribution issue make review inappropriate.

Defendants never answered the complaint in the district court and are in default. A motion for summary judgment is not a responsive pleading or one of the motions which extends the time to answer under Rule 12, F.R. Civ. P. Poe v. Cristina Copper Mines, 15 F.R.D. 85, 87 (D. Del. 1953). Defendants had made a Rule 12 motion, which was

denied on October 16, 1978.

A default exists when no answer is timely filed even if such default is not formally entered on the docket. Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185, 187 (3rd Cir. 1942).

Defendants in default have no right to raise defenses, much less affirmative defenses such as res judicata or collateral estoppel. A party in default has lost his standing in court, cannot appear in any way, cannot adduce any evidence, and cannot be heard at final hearing, excepting as to amount of damages. Clifton v. Tomb, 21 F.2d 893, 897 (4th Cir. 1927). A fortiori, a party in default is not entitled to a writ of certiorari to review the merits of his defenses.

Defendants never disclosed to Mrs. Boileau, her counsel, or the district court that Blank, Rome was freely making campaign contributions to state judges who sat on Mrs. Boileau's case.

Assuming this court were to reverse on the original res judicata issue, the effect of Blank, Rome's campaign contributions would remain an issue in the action.

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Certificate of Service

The undersigned counsel hereby certifies that he served three copies of the foregoing brief upon other counsel of record on July 20, 1984, by first class mail.

Served upon:

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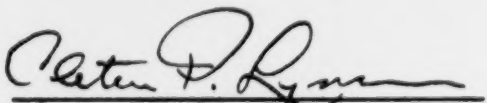

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